APPENDIX B

Sections 4 and 5 of the Natural Gas Act, 52 Stat. 824, 15 U. S. C. 717, *et seq.* read in pertinent part as follows:

* * * * *

4(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time

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when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed, the Commission shall have authority, either upon complaint of any State, municipality, or State Commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate,

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charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, af-

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ter a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 31

FEDERAL POWER COMMISSION, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION [1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 139–155) is reported at 215 F. 2d 883. The opinion and order of the Federal Power Commission which was reversed by the Court of Appeals is set out at R. 1–6.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1954 (R. 155). By order

[1] This is a companion case to *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation and Federal Power Commission*, No. 17, this Term, also pending before this Court on writ of certiorari. The question here is related to that presented in *Federal Power Commission* v. *Sierra Pacific Power Company*, No. 51, this Term, and its companion case, *Pacific Gas and Electric Company* v. *Sierra Pacific Power Company*, No. 53, this Term.

of Mr. Justice Burton dated November 29, 1954, the time for filing a petition for a writ of certiorari was extended to and including February 4, 1955 (R. 157). The petition for a writ of certiorari was filed on January 20, 1955 and granted on February 28, 1955 (R. 158), 348 U. S. 950. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTION PRESENTED

Whether under the Natural Gas Act the Federal Power Commission may accept for filing and permit to become effective a schedule submitted by a natural gas company increasing its rate for the sale of natural gas for resale to an industrial user, pending a hearing as to its reasonableness, where the existing rate is embodied in a contract between the gas company and its purchaser, filed with the Commission as a rate schedule, and the purchaser has not agreed to the increase.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, *et seq.*, are set out in the Appendix, *infra*, pp. 101–104.

STATEMENT

Respondent, Mobile Gas Service Corporation, is an Alabama utility which distributes and sells natural gas locally to domestic and industrial users (R. 8). It purchases its entire supply of

natural gas under contract with United Gas Pipe Line Company, a natural gas company under the Natural Gas Act.

In January 1936, Mobile contracted with the predecessor of United for the purchase of its requirements of gas for resale in the city of Mobile and nearby areas (R. 9, 24, 81–86). Upon the enactment of the Natural Gas Act, the contract was filed with the Commission as Rate Schedule No. 20 (R. 9). The contract was amended in 1941 to provide that gas for industrial resales was to be supplied by United to Mobile at a rate of 80–90% of the proceeds received by Mobile, but not less than 16¢ per Mcf unless United consented in writing (R. 9, 87). This amendment was filed with the Commission as Supplement No. 7 to Rate Schedule No. 20 (R. 55–56).

In 1946, United agreed with Mobile to reduce its price on the gas which Mobile proposed to resell to Ideal Cement Company for industrial use to a fixed percentage of the proceeds, although this would result in United's receiving less than 16¢ per Mcf (R. 2, 10, 90–95). An amendment embodying this contract was filed with the Commission as Supplement No. 10 to Supplement No. 7 (R. 56–57).[2] At the same time Mobile con-

[2] Another amendment, not material to this case, was made by contract in 1946 and was filed with the Commission as Supplement No. 9 to Rate Schedule No. 20 (R. 57–58). It

tracted to supply gas to Ideal for a ten-year period (R. 3, 9–10) at a price which, while it varied with the amount of total deliveries, resulted in an average charge by Mobile of 12¢ per Mcf (R. 10, 12, 91, 140).

Subsequently, in May 1952, United filed its Gas Tariff Original Volumes No. 1 and No. 2 to comply with the Commission's requirement that all rates be restated in tariff form and in dollars and cents (R. 24). See 18 C. F. R. 154.81–86; 154.38 (d). While United proposed by these filings to increase other contract rates substantially (R. 60–62),[3] the rates to Mobile were not affected, with the tariff merely substituting for the contract's percentage rate an equivalent rate of 10.7¢ per Mcf (R. 3, 10–11, 58–59).

On June 24, 1953, United filed the rate schedules here involved with the Commission whereby it proposed to increase the rates for a number of its sales to various customers, including Mobile (R. 1, 11, 66–67). The increase in the rate to Mobile for the gas resold to Ideal was from 10.7¢ to 14.5¢ per Mcf (R. 1, 11, 25). United also sought a waiver of the thirty-day notice period

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modified the general provisions governing rates for industrial resale in some respects but continued to provide a rate fixed at a percentage of Mobile's proceeds, with a minimum rate of 16¢ per Mcf unless United consented in writing (R. 88–90).

[3] Acting under Sections 4 (d) and 4 (e) of the Natural Gas Act, *infra*, pp. 101–103, the Commission, upon receiving objections to these increases, suspended the proposed increases pending a hearing on their reasonableness (R. 60–64).

provided in Section 4 (d) of the Gas Act, *infra*, pp. 101–102, and requested that the effective date of the new schedules be July 15, 1953 (R. 1, 67).

By order dated July 10, 1953, the Commission refused to accede to United's request that the thirty day notice period be waived (R. 1, 66–70). Instead, noting that United's increased rates "have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful" (R. 67), the Commission entered upon a hearing into the reasonableness of the proposed increases under Section 4 (e) of the Act, *infra*, pp. 102–103; it consolidated United's new application with other proceedings then pending and involving United's rates and fixed July 20, 1953, as the date for hearing on the lawfulness of the proposed rates (R. 69). In addition, pending the outcome of the hearing, the Commission, acting under the provisions of Section 4 (e), suspended for five months from the time the rates otherwise would be effective, (*i. e.*, until December 25, 1953) all of the proposed increases, which it was authorized to suspend under that Section, including those to Mobile (R. 69).[4] But since Section 4 (e) expressly prohibits suspension of rates for sales for industrial resale, the Commission ordered that the proposed rate schedules for sales for industrial resale, including the Mobile-Ideal sale,

[4] At the expiration of the suspension period, all the suspended rates were ordered in effect subject to refund, as authorized by Section 4 (e) (R. 106).

"be and the same are hereby permitted to become effective on July 25, 1953," the last day of the thirty-day notice period provided in Section 4 (d) (R. 69).

Mobile first filed a petition for intervention in the consolidated proceedings on July 16, 1953 (R. 70–72), and on August 4, 1953, a petition therein for modification of the Commission's order (R. 19). However, on August 7, 1953, Mobile amended its petition for modification and invoked a separate proceeding in which it sought to attack the July 10, 1953, order (R. 19–20). The amended petition (R. 7–18) requested the Commission: (1) to amend its order of July 10, 1953, so as to reject the filing of the new schedules for the Mobile-Ideal sales on the ground that the rates fixed in the United-Mobile contract could not be changed by United's "unilateral action" in filing schedules without "a hearing and a determination [by the Commission] that the said existing contract * * * is unjust and unreasonable" (R. 12); (2) if rejection were denied, to order a separate hearing on the lawfulness of the higher rates filed by United for the Mobile-Ideal sales (R. 13); (3) to amend the paragraph of the order which permitted the Mobile-Ideal rates to become effective in order to make it clear that the Commission does not approve such rates (R. 13–16); and (4) to direct United to refund to Mobile the difference, if any, between

the rates proposed by United and those finally determined by the Commission (R. 16–17).

On December 7, 1953, the Commission dismissed Mobile's petition and terminated the separate proceeding (R. 1–6). The Commission held, first, that United's filings could not be rejected because they were made in conformity with the Commission's regulations and Section 4 of the Natural Gas Act, the only section under which a natural gas company could initiate a rate increase (R. 3). It then ruled that no good reason was shown for a separate hearing; the consolidated hearings, which had already begun, were more practical since the reasonableness of the rate for the Mobile-Ideal sale raised issues common to the other rates involved in the consolidated hearings (R. 3–4). In addition, the Commission noted that it was unnecessary to amend the order permitting the rates for the Mobile-Ideal sales to become effective since the Commission thereby merely refused to waive the thirty-day notice period and it was clear that no approval was implied (R. 4–5). Finally, the Commission held that it had no power to order refunds in the case of sales for resale for industrial use, since the rates for such sales are not suspendible under Section 4 (e) and its refund authority is restricted to suspendible rates (R. 5).[5]

[5] After the decision below, United and Mobile proposed an alteration in their arrangement as to industrial resales, under which United would sell gas directly to these industrial

Upon denial of its petition for rehearing, (R. 38–45, 46–47), Mobile sought review in the Court of Appeals for the Third Circuit (R. 47–55, 95–103). The court below (per McLaughlin, J.), reversed the Commission's order and directed it to reject the filing by United of proposed increases covering its sales to Mobile for resale to Ideal. It held that since those rates had been established by contract, they could be altered only pursuant to a determination by the Commission, made after hearing, that the existing rates were unjust and unreasonable (R. 139–155).[6] Judge Hastie dissented (R. 155).

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customers, including Ideal, as an assignee of Mobile's contracts, and Mobile would receive 2¢ per Mcf for transporting the gas. While the Commission approved the new arrangement on April 15, 1955, this approval is prospective only, with the question presented in this case still outstanding as to the proper rate from July 25, 1953 (when the increased rate of 14.5 cents per Mcf filed by United went into effect) until after April 15, 1955 (when the above new arrangement was consummated). United's right to retain the 3.8 cents per Mcf increase (aggregating approximately $240,000 for the period involved) depends on whether the Commission properly permitted the increased rate to become effective July 25, 1953. If not, Mobile would be entitled, as the court below ruled, to the return of the increased amount. Thus, the disposition of the increase already paid awaits the determination of the present case.

[6] In view of this holding, the court did not reach a further question raised by Mobile—whether, assuming the proposed Mobile-Ideal increase could become effective prior to a determination as to its reasonableness, the Natural Gas Act authorized the Commission to order refunds should the new rate for the industrial resales be later found to be unreason-

SUMMARY OF ARGUMENT

I

A. The clear language of the Natural Gas Act belies the conclusion below that since Mobile's rate had been established by contract with United it could be altered only pursuant to a Commission determination, after hearing, that the existing contract rate was unreasonable. On its face, the Gas Act sets out two separate and distinct procedures for making changes in rates, (1) the filed rate procedure of Sections 4 (d) and (e) (followed in this case) and (2) the hearing and order procedure of Section 5 (a) (the procedure which would have to be followed under the decision below). And the statutory language leaves no doubt that the Section 5 (a) procedure is available only when initiated by the Commission on its own motion or by someone other than the selling gas company; the latter may initiate rate changes only under the filed rate procedure. Each procedure thus complements the other with no overlap. Consequently, when a gas company files new schedules, the Commission has no choice but to follow the filed rate procedure of Sections 4 (d) and 4 (e); it may enter into a hearing as to the reasonableness of the proposed rates and suspend them for five months pending the hear-

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able (R. 154–155). Consequently, the question as to refund is not involved in the present posture of the case.

ing, except for rates for gas for industrial resale which may not be suspended. That is what the Commission did in this case, and it exercised the full discretion it had in favor of Mobile. The rate for the gas sold to Mobile for resale to Ideal went into effect thirty days after it was filed by United solely because the Act prohibited its suspension.

The existence of a contract rate plays no part in fixing the procedure to be followed in processing a rate change. Not only is it the almost universal practice in regulating utilities to treat contract rates in the same manner as other rates, but the Natural Gas Act specifically precludes any such distinction. The filed rate procedure and the Section 5 (a) procedure both refer in parallel terms to, and are applicable to, changes in "any rate * * * or * * * contract," thereby demonstrating that the source of the existing rate is immaterial to the determination of the applicable procedure. Nor is there any support for Mobile's reading of "contract" in Section 4 (d) as meaning that the purchaser must agree to the changes before that Section is applicable. Section 4 (d) deals with *changes "made* by any natural gas company" [emphasis added], and requires the filing of new "schedules", not "contracts"—requirements which negate the necessity of the purchaser's assent. Moreover, Mobile's reading would be equally applicable to "contract" in Sec-

tion 5 (a), and, if accepted, would result in complete frustration of Commission regulation.

Contrary to Mobile's contention, our construction of the Natural Gas Act does not "automatically abrogate" contracts. Rather, such contracts continue to be valid and enforceable as utility contracts, subject to modification in accordance with the prescribed procedures—either under Sections 4 (d) and 4 (e) or Section 5, depending on who is seeking the rate change.

B. The Commission has consistently followed the filed rate procedure in circumstances such as are here involved; without regard to whether the existing rate is embodied in a contract. The Commission's regulations, in setting forth requirements for filing by a gas company of rates and of rate changes, make no distinction between contract-embodied rates and others.

II

A. The meagerness of legislative discussion on the methods of changing rates in the Gas Act suggests that Congress intended these provisions to be read in accord with their ordinary meaning, as the Commission has done. This is buttressed by the few legislative references to Section 4; in each instance, the filed rate procedure was treated as having general applicability to all existing rates. Furthermore, during its course through the Congress, the Act was said to contain

"the usual provisions" of federal regulatory measure, with "nothing novel in its provisions."

B. That the Commission's reading is neither novel nor unusual is shown by a comparison with the Interstate Commerce Act. The methods for changing rates in the Gas Act and the Power Act are set forth in substantially the same form and were taken bodily from the Commerce Act, with a few pertinent changes. The Commerce Act contains a filed rate procedure, corresponding to Sections 4 (d) and 4 (e) of the Gas Act, as well as a complaint, hearing and order procedure, corresponding to Section 5 (a). The impact of a change in rate filed by the carrier upon a contract-fixed rate—the precise issue in this case—was considered by this Court under the Commerce Act in *Armour Packing Co.* v. *United States*, 209 U. S. 56. The square holding in *Armour* that the filed rate superseded (without a hearing) the contract rate is highly persuasive here, since the provisions of the Commerce Act were adopted in the Gas Act.

While the Gas and Power Acts, unlike the Commerce Act, provide for filing of contracts, Congress did not thereby intend to depart from *Armour* and make contract rates immune from change under the filed rate procedure. For, in addition to requiring the filing of contracts, Congress added appropriate language to Sections 4 (d) and 4 (e), as well as to Section 5 (a) (and the corresponding sections of the Power Act), to make

each of the two rate procedures expressly applicable to changes in contract rates.

C. 1. Likewise, the overwhelming majority of state regulatory schemes provide a filed rate procedure comparable to the Gas and Power Acts. Under these statutes, this Court, and the state courts with but little dissent, have held that the filed rate procedure may be invoked by a utility to effectuate a change in a rate fixed by contract. In each of a number of cases arising under these statutes, the courts rejected contentions of the purchasers, similar to Mobile's here, that because the existing rate was embodied in a contract, increases could not be made under the filed rate procedure. See, *e. g., Suburban Water Co. v. Oakmont Borough,* 268 Pa. 243, 248–250; *Public Service Commission* v. *Pavilion Natural Gas Co.,* 232 N. Y. 146, 150–151; *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.,* 147 Ark. 502, 506–507.

Two of these state cases came before this Court. In both, the Court recognized the propriety of using such filed rate procedures to change contract rates. *Midland Realty Co.* v. *Kansas City Power & Light Co.,* 300 U. S. 109, affirming 338 Mo. 1141; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.,* 245 U. S. 633, affirming 159 Wisc. 130. In *Midland,* this Court, in addition to holding that there was no constitutional objection to the use of a filed rate procedure to supersede contract rates, specifically ruled that under the Missouri statute (similar to the Gas Act) the

rates filed by the utility effectively superseded contract rates.

2. A minority of state legislatures have modified the filed rate procedure, and their statutes require commission approval of changes before they become effective. Only in Connecticut, and to some extent in Washington, did the legislatures make the applicable procedure dependent on whether the existing rates are embodied in private contracts, and exclude such contract rates from the filed rate procedure. Congress, however, chose to incorporate the "usual," "standardized" provisions rather than these deviations followed by a few states, and the filed rate procedure adopted by Congress therefore applies to contract rates.

3. The court below erroneously relied on *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, where this Court, accepting Kansas' interpretation of its statute, invalidated a Kansas commission order authorizing an increase in a contract rate without a finding that the existing rate was unreasonable. Not only is the Kansas statute a minority provision which Congress did not intend to adopt but it differs from the Gas Act in that it does not contain a filed rate procedure comparable to Sections 4 (d) and 4 (e). Changes filed by a utility expressly require the consent of the Kansas commission, and, furthermore, the only Kansas provision for hearing as to rates is one similar to

that in Section 5 (a) of the Gas Act. Under such a provision—differing markedly from that in *Midland* and here—it is understandable why the Kansas court held that a filing, without more, cannot supersede contract rates.

III

A. The court below apparently felt that since Mobile would be caught in a "squeeze" between its contract rate with Ideal and United's proposed increase, it was inequitable to permit United's new rate to be operative during the pendency of the hearing. However, this inequity may be more apparent than real. There is nothing to indicate that Mobile could not obtain relief from its contract with Ideal under the Alabama regulatory statute. Moreover, in the overwhelming majority of states, such relief could be obtained and any Alabama deviation should play no part in construing the Gas Act.

B. Should Mobile suffer a loss on its Ideal resales during the time required for the Commission's hearing and decision, this may be offset by the fact that United's proposed increases on other sales to Mobile were suspended for five months. It is such rough balancing that Congress apparently had in mind in prohibiting the suspension of sales for resale for industrial use. And any losses sustained by Mobile during the period needed to pass upon United's new rate here—or by the gas company in other cases where the rates are suspended—is a necessary

incident of rate regulation. See *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C. A. 4). Even if it be assumed that there has resulted an undue burden on purchasers of natural gas for industrial resale, like Mobile, such a defect must be cured, if at all, by the legislature. There is no basis on which the court can balance the equities by relieving those who have contract rates at the cost of discriminating against others.

IV

In two cases where the issue was raised, the Fifth Circuit and the Third Circuit, the court which rendered the instant decision, recognized that the filed rate procedure was applicable in situations comparable to that here involved. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73, 77–78 (C. A. 5); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, 902 (C. A. 3). In contrast, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (C. A. 10), relied upon by the court below, is irrelevant since it involved an order of the Commission after a hearing on complaint under Section 5 (a). There was no issue as to the filed rate procedure before the Tenth Circuit and that court did not purport to express an opinion on it.

ARGUMENT

When United filed with the Commission new schedules increasing, among others, its rate for gas

supplied to Mobile for industrial resale to Ideal, the Commission followed the filed rate procedure which has long been established and which it believes is mandatory under Sections 4 (d) and 4 (e) of the Gas Act. Since the Commission's preliminary inquiry indicated that the newly filed increases might be unlawful, a hearing was ordered on the reasonableness of the new rates. Pending the outcome of that hearing, the Commission suspended all suspendible rates for the maximum period allowed by the Act and postponed, for as long as possible under the Act, the effective day of United's rates for industrial resale (including the Ideal resale) as to which the Act prohibited suspension.

The court below has held that the Commission erred in following this procedure with regard to the rate for the Mobile-Ideal resale. In the court's view, Sections 4 (d) and 4 (e), which provide the procedure to be followed when a natural gas company seeks to increase its rates, are inapplicable where existing rates were established by contract and the purchaser does not agree to the increase. Reasoning that statutes are not to be read to limit contract rights except where expressly provided, and that "the Natural Gas Act does not expressly permit existing contract rights to be abolished by a mere unilateral filing of new rates" (R. 148), the court held that contract rates are to continue in effect until the Commission determines after a hearing, held under

the provisions of another section, Section 5 (a), that the contract rates are unreasonable (R. 146, 148). Accordingly, the court held, since no such hearing had been had and Mobile had not agreed to the increase, the Commission should have not permitted United's increase for the Mobile-Ideal resale to become effective but should have rejected United's filing.

We believe that the court below departed from the Natural Gas Act when it set aside the procedure followed by the Commission in this case, a procedure employed in all similar cases where a natural gas company has sought to increase its rates. This established Commission practice follows to the letter the plain language of the Act, and, far from being "of a radical nature" (R. 154), accords with long-standing interpretation of similar federal statutes, upon which the Natural Gas Act was patterned, and of analogous state regulatory statutes. Viewed in this light, there is "nothing novel in [the] provisions" (H. Rep. No. 709, 75th Cong., 1st Sess., p. 3) of Sections 4 (d) and 4 (e) as construed by the Commission; instead, as so interpreted, they contain no more than "the usual provisions * * * such as we find in all regulatory measures enacted by Congress" (81 Cong. Rec. 6722). While the result reached below has been expressly incorporated in a few state statutes, Congress has not seen fit to insert into Sections 4 (d) and 4 (e) the exception formulated by the Court of Appeals;

as one district judge has noted, "It is not for this Court to add another proviso, reading 'and where there is no private agreement or contract to the contrary.'" *Tyler Gas Service Co. v. United Gas Pipe Line Co.*, E. D. Texas, Civil No. 1662 (reproduced at R. 73, 79), affirmed, 217 F. 2d 73 (C. A. 5). Congress has provided, and the Commission has applied, a procedure which accords with that of the majority of the states in the comparable phase of state utility regulation. If a change to the minority view is to be made, it should be made by Congress.

I

THE TERMS OF THE NATURAL GAS ACT AND THE CONSISTENT ADMINISTRATIVE PRACTICE REQUIRED THE COMMISSION TO ACCEPT UNITED'S FILING AND TO PERMIT IT TO GO INTO EFFECT EVEN THOUGH THE EXISTING RATE WAS ESTABLISHED BY CONTRACT

A. THE FILED RATE PROCEDURE SET OUT IN SECTIONS 4 (d) AND 4 (e) WAS APPLICABLE ACCORDING TO ITS TERMS

The decision below ignores the critical factors (1) that the Gas Act sets out two separate procedures for making changes in the rates charged by a natural gas company, and (2) that the Act does not allow a free choice of procedures to the Commission, natural gas companies, or third parties, but rather prescribes the conditions for invoking each. Under neither of these procedures is it in any way material that the rate being superseded is embodied in a contract with the

purchaser or that the purchaser has not consented to the change.

1. Sections 4 (d) and 4 (e) (App., *infra*, pp. 101–103) set out the filed rate procedure for effectuating rate changes. Section 4 (d) provides that "no change shall be made by any natural-gas company in any such,[7] rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto" except upon filing of new schedules and 30 days' notice to the Commission and to the public; however, the Commission may, by order, permit the rates to take effect without such notice. When any such new schedule is filed, the Commission has authority under Section 4 (e) to enter upon a hearing as to the lawfulness of the rate proposed.[8] Pending the hearing and decision, the

[7] The "such" refers to Section 4 (c), *infra*, p. 101, which provides:

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all *contracts* which in any manner affect or relate to such rates, charges, classifications, and services." [Emphasis added.]

[8] The Commission's rules require that every proposed change be supported by the inclusion in the filing of data necessary to enable the Commission to appraise the change. If an increase is involved, a justification therefor must be included in the filing with a comparative study of sales and

Commission may suspend the proposed rates for a maximum of five months beyond the time when the rates would otherwise go into effect, except that the Commission has no authority to suspend a rate "for the sale of natural gas for resale for industrial use only." At the end of the suspension period, if the proceedings have not been completed, the company may put the proposed rates into effect, subject to refund of the amounts, if any, later found to be unreasonable by the Commission.

Under this procedure, the Commission is not required to enter upon a hearing; it may do so under its practice if its study of the supporting data filed with the increase (see n. 8 *supra*, pp. 20–22) shows that the proposed rate may be unlawful. If no hearing is ordered, the rates become effective at the

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revenues under the old and new rates, a comparison of the new rates with other rates charged by the seller for similar services, and plant and operating data providing the information necessary for a determination of the cost of rendering the service. 18 C. F. R. 154.63, 35.3. The Commission has described its procedure upon receipt of such filings as follows (F. P. C. Annual Report, 1940, p. 71):

"* * * In each case the staff checks the accuracy of the information submitted, makes the necessary analyses and comparisons and studies the operating conditions involved, in order to determine whether there is evidence of unreasonableness or discrimination. The results of these studies are summarized in the form of brief reports on which the Commission acts.

"When the review of current rate filings indicates the desirability of a more complete analysis, or in response to complaints concerning rates already filed, the staff undertakes a preliminary investigation. Such studies provide suf-

close of the notice period.[8] If the Commission does hold a hearing, it relates, as the court below explicitly recognized (R. 143), to the reasonableness of the *proposed rate*.

The second procedure for effecting a change in rates is set out in Section 5 (a) App., *infra*, pp. 103–104. Under that Section, new rates may be fixed by order of the Commission but only after a hearing and a finding that the existing rate is unreasonable or otherwise unlawful. A proceeding to this end may be instituted by the Commission on its own motion or upon the complaint of "any State, municipality, State commission, or gas distributing company." Section 5 (a) provides that whenever in such a proceeding the Commission finds unreasonable "any rate, charge, or classification" or "any rule, regulation, practice, or contract affecting such rate, charge, or classification," it shall determine and fix the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed. In contrast to

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ficient information for decisions as to the necessity or feasibility of formal action. * * *"

[8] The rate filed by a natural gas company pursuant to Section 4 (d) is, upon becoming effective, the legal rate, enforceable in the same way as a Commission-determined rate. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, holding (at 251):

"[Petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

As pointed out in more detail *infra*, pp. 33–35, a filing may be rejected for formal or procedural defects but it may not be rejected, without a hearing, on substantive grounds.

Sections 4 (d) and 4 (e), rate changes under Section 5 (a) may be made only pursuant to an order made after a hearing addressed to the reasonableness of the *existing rate*.

While both procedures are addressed to the same general subject matter, *i. e.*, the changing of existing rates charged by a natural gas company, it is clear that each procedure is available only in certain prescribed situations. The Section 4 (d) and 4 (e) mechanism is to be used only when a natural gas company seeks to change its rates. Section 4 (d) not only expressly prohibits a gas company from changing its rates without complying with the procedure therein set out, but makes no provision for its invocation by anybody else. In contrast, Section 5 (a) permits the initiation of the procedure there provided by the Commission or by "any State, municipality, State commission, or gas distributing company";[10] significantly, natural gas companies are omitted from the detailed enumeration of those authorized to invoke Section 5 (a).[11] Thus, Sections 4

[10] "Gas distributing company" evidently refers to a local distributor of gas, such as Mobile, which purchases from the natural gas company the gas transported by it in interstate commerce. See Section 1 (b) of the Gas Act; R. 3.

[11] The corresponding provision of Section 206 (a) of the Federal Power Act, *infra*, p. 106, has the same effect. While it is phrased, "whenever the Commission, after a hearing had upon its own motion *or upon complaint*, shall find" (etc.), Section 306 of that Act, *infra*, p. 107, which deals with *complaints* generally, is limited to those "complaining of anything done or omitted to be done by any * * * public utility." Plainly, the selling public utility may not file such a complaint against itself.

(d) and (e) and Section 5 (a) together deal with all situations in which rate changes may be sought and each procedure complements the other, with no overlap. Rate changes when initiated by a gas company are processed under Sections 4 (d) and 4 (e), and when begun by some one other than the natural gas company itself are governed by Section 5 (a).

Since the clear language of the Act permits a *natural gas company* to seek a rate change only under the filed rate procedure of Sections 4 (d) and 4 (e), the Commission had no choice, when United filed its new schedules, but to follow, as it did, the procedure prescribed in these sections.[12] Indeed, the Commission exercised the full discretion it had under this procedure in favor of Mobile. The Commission refused to permit the proposed rate increases to be effective prior to the expiration of the thirty-day notice period, and, on its own initiative, it "enter[ed] upon a hearing concerning the lawfulness of such rate, charge, classification, or service" (Section 4 (e), *infra*, p. 102, see *supra*, pp. 5–6). In addition, "pending such hearing and the decision thereon," the Commission suspended the operation of the suspendible new schedules for five months but

[12] Under the corresponding sections of the Federal Power Act, the Commission has recognized that the utility is authorized to proceed only under the filed rate provision, and not by complaint. *City of Los Angeles* v. *Nevada-California Electric Corp.*, 2 F. P. C. 104, 108–09. See, fn. 11, *supra*, p. 23.

under the terms of the proviso prohibiting suspension of rates for sales for resale for industrial use the Commission was powerless to prevent the proposed increase for the Mobile-Ideal sale from becoming effective at the end of the thirty-day notice period.

2. The court below disregarded the Act's clear language and structure, and held instead that—solely because United's proposal would supersede the rate agreed to with Mobile and Mobile had not consented to the change—the Commission was required to follow the Section 5 (a) procedure of hearing and determination as to the reasonableness of the existing contract rate.[13]

(a). However, the existence of a contract rate, which the court below regarded as decisive, plays no part in fixing the procedure to be followed in processing a rate change. The general principle

[13] This holding was plainly based on statutory grounds, *i. e.*, that the Commission had misread the Act, and not on constitutional grounds. It is clear that there is no constitutional defect in the Act as interpreted by the Commission. Aside from the general subordination of utility contracts to regulatory legislation—discussed immediately below in the text—it has been specifically decided by this and other courts that a legislature may provide that, without any order of the regulatory commission, rates filed by a utility go into effect and supersede contract rates at once, although subject to subsequent administrative action. *E. g.*, *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.*, 245 U. S. 633; *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, 151; *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243, 248, 252–54. See *infra*, pp. 49–50, 58–68.

is established that utility contract rights are always subject to the continuing power of the legislature and its authorized delegates: *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 482; *Producers Transp. Co.* v. *R. R. Comm.*, 251 U. S. 228, 232; *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, 375–376; *Armour Packing Co.* v. *United States,* 209 U. S. 56, 82; *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109. The holdings under the Natural Gas Act are to the same effect; contracts are fully subject to the Act. See *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C. A. 5), certiorari denied, 332 U. S. 770; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (C. A. 6); *Mississippi River Fuel Corporation* v. *Federal Power Commission,* 121 F. 2d 159, 163 (C. A. 8). See also *infra,* pp. 90–96.

The same considerations which support the general principle of subordination of private utility contracts to public regulation indicate why, in the specific field of rate fixing, Congress would have little reason to accord contract rates greater stature than other forms of rates. As between the parties, contracts do have, of course, a special status in our law. But the dominant factor in rate regulation is not the purely private interests or rights of the particular parties *inter se,* but the reasonableness of the rate in the light of the public interest. See *e. g., Federal Power Commission* v.

Natural Gas Pipeline Co., 315 U. S. 575, 585–6; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 600–603. And the fact that the existing rate was fixed in a private contract would have little, if any, bearing on the determination of the reasonableness of the proposed increase, or for that matter, of the contract rate. For in agreeing upon the rate, the parties were motivated primarily by private considerations whereas the Commission is bound to consider the question in the light of the rate structure generally and of the public interest. Thus, while a utility may feel impelled to grant a low rate to one purchaser in order to obtain the business, that rate may be out of line with the rest of its rate structure and thereby, without warrant, relieve the purchaser of paying his proper share of the burden of providing a reasonable return to the utility.[14] In this connection, it is significant, we believe, that of all the states, only Connecticut and Washington (and the latter only as to old contracts) place contract rates generally in a preferred category. (And this has been done in those two jurisdictions by specific legislation, and not by judicial decision.) See *infra*, pp. 70-71. The almost universal practice is that all rate forms

[14] See *Duquesne Light Co.* v. *Public Service Commission*, 273 Pa. 287, 296; cf. *Public Service Commission* v. *Great Northern Utilities Co.*, 289 U. S. 130, 132–133; *Tyler Gas Service Co.* v. *United Gas Pipe. Line Co.*, 217 F. 2d 73, 77 (C. A. 5).

are on the same plane and are to be treated in the same manner.

(b). Specifically, as to the problem at hand, there is nothing in Sections 4 (d) and 4 (e) or Section 5 (a) of the Gas Act to support the conclusion that Congress (unlike the very great majority of the states) has made the existence of a contract relevant in determining whether Sections 4 (d) and 4 (e) on the one hand, or Section 5 (a) on the other, is applicable. On the contrary, the Act precludes any such distinction. The first sentence of Section 4 (d) defines that and the succeeding subsection (e) as applying to "any such[15] rate, charge, classification, or service, or * * * any rule, regulation, or *contract relating thereto.*" [Emphasis added.] Section 5 (a) provides that it applies to "any rate, charge, or classification * * * or * * * any rule, regulation, practice, or *contract affecting such rate, charge, or classification* * * *" [Emphasis added.]

Both sections thus refer in parallel terms to changes in "any rate, charge, classification * * * or * * * any rule, regulation or *contract.*" By failing to provide any distinction based on the source or form of the existing rates—*i. e.*, whether they were fixed by the Commission or by the natural gas company alone or by agreement with the purchaser—the Act on its face refutes the

[15] See *supra*, fn. 7, p. 20.

result below that Section 5 (a), rather than the filed rate procedure of Sections 4 (d) and 4 (e), is applicable to rate increases proposed by a gas company solely because of the contract form of the existing rate or the lack of the purchaser's assent. Cf. *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388, 390–391 (C. A. 5), certiorari denied, 332 U. S. 770. The distinction between Section 4 and Section 5, as we have pointed out, is in the source of the proposal for a change in the rate and not in the source or character of the existing rate itself.

(c). Nor is the result below aided by Mobile's contention (R. 12; Br. in Opp. 4) that "contract," as used in Section 4 (d), refers only to the situation where the purchaser has agreed to the rate change. While "contract" suggests an agreement between two or more parties, it is significant that what Section 4 (d) deals with is not the contract itself, but rather with *changes* in the contract. And as to changes, Section 4 (d) concerns those "made by any natural-gas company."[16] This provision plainly imposes no requirement that there be a concurring party to the change. As pointed out below (pp. 37–39), the Commission's regulations provide for filings of proposed changes under Section 4 (d) only by

[16] Unless the Commission otherwise orders, *no change shall be made* by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, * * *" [Emphasis added.]

the natural gas company (18 C. F. R. 154.1–.86) and, as United's history indicates, all changes in contracts whether or not agreed upon have been filed by that company alone (R. 55–58).

Furthermore, the Section is explicit in providing that a change in any "rate * * * or in any * * * contract relating thereto" may be made only after notice which "shall be given by filing with the Commission and keeping open for public inspection new *schedules* * * *." It is noteworthy that the statutory language refers not to "new contracts," which might imply concurrence of the customer, but rather to "new schedules," which contemplates an action initiated by the selling natural gas company alone.

(d). Moreover, if "contract" in Section 4 (d) were read as Mobile contends, the same reading would also govern the parallel term "contract" as it appears in Section 5 (a) *infra*, pp. 103–104. Such a restricted reading would prohibit the Commission from ordering, without the purchaser's assent, a change in rates embodied in contracts even after it had determined, after hearing in accordance with Section 5 (a), that the contract rate is unlawful. The result would be to prevent any rate change over the purchaser's objection. Apparently recognizing that such a reading would completely frustrate rate regulation by the Commission, Mobile and the court below both accept the view that the Commission may, in such circumstances, direct a change in contract rates,

as well as other rates, without the purchaser's assent. Indeed, Mobile contends and the court below held that United should properly have sought to invoke the Section 5 (a) procedure (R. 12, 32, 142, 146–48). Obviously, then, "contract" in Section 5 (a) has no such limiting meaning, and since there is nothing in the Act to show that, contrary to the usual rules of construction, "contract" is to be read differently in the two sections,[19] it follows that "contract" in Section 4 (d) also has no such restricted scope.

(e). Perhaps in a bold effort to hurdle the textual difficulties of its position, Mobile insists

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[17] See *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (C. A. 10), affirmed, 324 U. S. 581; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 121 F. 2d 159 (C. A. 8).

[18] Since, as already shown, *supra*, pp. 23–24, United as a natural gas company could not initiate rate changes under Section 5 (a), the only avenue open to United would be the circuitous method of requesting the Commission to initiate a Section 5 (a) proceeding on its own motion.

[19] It is ordinarily assumed that the same words used by Congress in different parts of the same act are intended to convey the identical meaning. *United States* v. *Cooper Corp.*, 312 U. S. 600, 606–07; *United States* v. *Hill*, 123 U. S. 681, 685–86; *Alexander* v. *Mayor and Commonalty of Alexandria*, 5 Cranch 1, 6–7. While this natural presumption will yield when the words are found in such dissimilar connections as to warrant inference of different intent (*Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87; *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, 433), no such difference can be read into the use of "contract" in Sections 4 (d) and 5 (a) of the Gas Act. Both sections employ the same term in the same context, *i. e.*, setting forth procedures for a change in rates.

on broadly posing the "real question" as "whether the passage of the Natural Gas Act automatically abrogated the right to enter into private rate contracts" (Br. in Opp. 6).[20] But the semantic inflation of the colorful words "automatically abrogated" cannot survive the prosaic and traditional reality of the filed rate procedure of Section 4. Under that system, private rate contracts, far from being "automatically abrogated" by the Gas Act, are specifically envisaged as continuing to be made and to be enforced (see *infra*, pp. 51–55); they are as valid, lawful, and enforceable as they have always been. But they also continue to be contracts for rates charged by a regulated company and as such continuously subject to modification or termination in accordance with prescribed procedures. See *supra*, pp. 25–27.

What Section 4 does is to establish the method by which these still-existing rate contracts can be changed at the instance of the gas company—in effect, a "post-audit" procedure leaving it to the Commission to determine the extent to which it need review the gas company's new rates in a formal hearing. Another route for change—available to the Commission, state agencies, and purchasers—is provided by the Section 5 "audit" procedure under

[20] The court below adopted the same approach (R. 148), as did the Court of Appeals for the District of Columbia Circuit in *Sierra Pacific Power Co.* v. *Federal Power Commission*, pending on writs of certiorari, Nos. 51, 53, this Term.

which the change cannot take place until after a hearing and determination on the existing rate. In neither case is the rate contract "automatically" or "unilaterally" "abrogated" in any true sense; in both cases, it survives healthily with the special incidents and character which have long been integral to utility rate contracts.

(f). Similarly, we need not stop long to point out the fallacy in Mobile's contention that it fully recognizes the filed rate procedure of Section 4 when it insists that the new rate must now be rejected as "unlawfully filed" but will become "lawfully filed" under that Section after it survives a hearing under Section 5 (Br. in Opp. 3). Such an interpretation of the filed rate system plainly destroys the signal differences between Sections 4 and 5 in favor of exclusive application of Section 5. In reality, Mobile is arguing that Section 5 alone applies to contract rates,[21] and that contention must face the formidable difficulties discussed above and the others yet to be presented.

The simple truth is that under Sections 4 (d) and 4 (e) the Commission has no authority to make a substantive determination as to the propriety of rate changes proposed by a gas company

[21] This is revealed clearly in Mobile's brief in opposition in No. 17, pp. 4–5, 8–10.

in advance of acceptance for filing and to reject the filing on such grounds. Although the Commission may reject a filing where the formal requirements are not met (*Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, 902 (C. A. 3))—for example, where there has been a failure to submit sufficient and proper supporting data (*Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (C. A. 4); cf. *North Pac. Coast Freight Bur.* v. *Department of Public Works*, 156 Wash. 137)—when there has been compliance with the formal filing requirements Section 4 (e) presents the entire range of alternative actions by the Commission.[22] According to the unambiguous provisions of that Section, "whenever any such new schedule is filed," the Commission's sole authority is to permit the rate to become effective without a hearing, to enter upon a hearing as to the reasonableness of the proposed increase, to suspend pending the outcome of the hearing the proposed increases except those for industrial resale, and to disallow the excess, if any, over the amount found to be reasonable. Plainly, such a provision con-

[22] The Commission's regulation provides that the filing date is the date the schedule "is received in the office of the Secretary of the Commission for filing in compliance with the requirements of this part." 18 C. F. R. 154.15. That acceptance of the filing is not the occasion for determining the propriety of a change in rate is shown by 18 C. F. R. 154.23, which provides that such acceptance "is not to be considered as approval by the Commission."

templates that substantive determinations be made not contemporaneously with the filing, but rather after the filing. Cf. *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d at 902:

> * * * On the face of Section 4 of the Natural Gas Act * * * it is clear that, Mississippi's proposed tariff changes having been duly filed, the Commission had only two alternatives. By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. It purported to follow a third course, rejection without hearing—a course for which it cannot show even color of statutory authority.[23]

B. THIS PROCEDURE HAS BEEN FOLLOWED CONSISTENTLY BY THE COMMISSION ON RATE INCREASE FILINGS BY SELLING COMPANIES IRRESPECTIVE OF CONTRACT

The Commission's opinions and orders make clear that it has consistently followed the filed rate procedure in circumstances such as are here involved. See, *e. g.*, *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F. P. C. 1044, petition for review dismissed, 170 F. 2d 150 (C. A. 8); *Re Panhandle Eastern Pipe Line Co.*, 9 F. P. C.

[23] See also *infra*, pp. 95–98.

443, 444–446; *Re Mississippi River Fuel Corp.*, 2 F. P. C. 170, 175–176, affirmed, 121 F. 2d 159 (C. A. 8); see also cases cited *infra*, p. 90, as well as *City of Los Angeles* v. *Nevada-California Electric Corp.*, 2 F. P. C. 104, 108–109; and *Pacific Gas and Electric Company*, F. P. C. Docket No. E–6482, order issued June 17, 1954, reversed *sub nom. Sierra Pacific Power Co.* v. *Federal Power Commission*,—F. 2d—(C. A. D. C.), pending on writs of certiorari Nos. 51, 53, this Term (both applying the similar filed rate provision contained in Section 205 of the Federal Power Act).

In the early *Mississippi River Fuel* case, where the gas company sought, as United did here, to increase existing rates embodied in a contract, the Commission followed the procedure of Sections 4 (d) and 4 (e). There, as here, the Commission entered upon a hearing of the reasonableness of the proposed rate and suspended the effectiveness of all the proposed increases except those for industrial resale which, not being suspendible, were permitted to become effective. See 2 F. P. C. at 172.[24] Subsequent practice has

[24] While Mississippi River later contended that the proposed increases were pursuant to agreement with its customer, the schedules filed apparently did not so indicate. The company's contention was made in an effort to escape suspension and hearing, on the theory that agreed-upon changes were not the changes contemplated by Section 4 (d), to be initiated by the natural gas company alone. The Commission's opinion leaves little doubt that it made no distinction between

continued to be under the filed rate procedure. For instance, when United, in 1952, undertook to comply with the Commission's requirement that all rates be converted from a percentage basis to a fixed dollars and cents amount (see *supra*, p. 4 and fn. 3), United simultaneously sought to increase its rates for a number of its sales, many of which were clearly embodied in contracts; upon receiving objections to the increases, the Commission followed the procedure of Sections 4 (d) and 4 (e) (R. 60–64).

The Commission's consistent construction is manifest not only from its actions in particular cases but by its regulations, which have uniformly adhered to the principle that the filed rate procedure is applicable whenever a gas company seeks to increase its rates, without regard to whether the existing rate is embodied in a contract or the change has been assented to by the purchaser. No distinctions are drawn between contract-embodied rates and others. All rates for natural gas, whether originally established by contract or otherwise, are now filed in the form of tariffs (18 C. F. R. 154.21, 154.31–.41, 154.82). An unexecuted copy of each form of contract is filed as subsidiary to the tariff (18 C. F. R. 154.40) with an index of purchasers listing the date of execu-

changes sponsored by the gas company alone and those agreed to by the purchaser. As far as the Commission was concerned, both came under the filed rate procedure. 2 F. P. C. at 172, 176.

tion of the contract, the effective date, and the term (18 C. F. R. 154.41); the executed contracts are separately filed (18 C. F. R. 154.26). Lumping all types of rates together, 18 C. F. R. 154.63 (a) refers to "the filing of any tariff, executed service agreement or part thereof which changes or supersedes any tariff, contract or part thereof on file with the Commission * * *." Similarly, 18 C. F. R. 154.63 (b) (2) requires:

> A comparative statement of sales made or transportation performed and revenues therefrom, by months, under the present and proposed tariff, contract, or part thereof, each applied to the transactions for the twelve months immediately preceding and for the twelve months immediately succeeding the proposed effective date of the change in tariff, contract or part thereof. * * *

and 18 C. F. R. 154.63 (b) (3) goes on to provide:

> If the proposed change in tariff, contract or part thereof will result in an increase in rates or charges, there shall be submitted in support of the proposed increased rate or charge a statement showing the cost of service for the entire system, and also the cost allocated to the particular service or classification for which the increase in rates or charges is proposed, together with an explanation of the allocation methods.

In this listing of the data to be submitted in support of the proposed increase, there signifi-

cantly is no reference to the original source of the rate.[25] Finally, 18 C. F. R. 154.85, relating to the status of restated contracts, provides:

> Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: * * *

Together with the uniform practice, these provisions of the regulations make plain the Commission's view that no special treatment need be accorded a tariff replacing a rate agreed upon by the gas company and the purchaser by private contract. If there were any doubt as to the propriety of the Commission's action in this case, this consistent administrative practice is, of course, entitled to great weight in resolving that doubt in favor of the Commission. See, *e. g.*, *United States* v. *Public Utilities Commission*, 345

[25] The regulations provide for notice to the purchasers affected (18 C. F. R. 154.16, .22, .63 (a)) and for subsequent comments thereon by "any purchaser or other interested party" (18 C. F. R. 154.27). It should be noted, however, that the purchaser's participation is permitted, not required, that it occurs after the filing, and that no distinction is made beween purchasers under a contract and others.

U. S. 295, 315; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

II

THE COMMISSION'S FILED RATE PROCEDURE UNDER SECTIONS 4 (d) AND 4 (e) ACCORDS, AS CONGRESS INTENDED, WITH THE USUAL PROVISIONS OF UTILITY REGULATORY STATUTES

The legislative history of the Natural Gas Act does not furnish a direct or conclusive answer to the question presented in this case, but all the indications, those of omission as well as of commission, support the Commission's position that contracts have no special exemption from the filed rate system. Perhaps the most significant element in the legislative history on this point is the repeated assurance that the Gas Act contains only the usual provisions of utility regulatory statutes; this key opens the door to a survey of comparable federal and state legislation which shows that the prototype of all such regulations, the Interstate Commerce Act, as well as the overwhelming majority of state statutes, do *not* exempt changes in contract rates from the filed rate procedure.

A. THE LEGISLATIVE HISTORY OF THE NATURAL GAS ACT

1. The salient factors in the legislative history of the Gas Act are the meagerness of discussion on the methods of changing rates and the absence of any comment on the applicability of the filed

rate procedure to changes in rates embodied in private contracts. These circumstances suggest, in themselves, that Congress intended the rate provisions of the Act to be read as the Commission has done, in accord with their plain and ordinary meaning, and consequently regarded explanatory comment as unnecessary.

This conclusion is buttressed by the few references to Section 4 in the legislative history, where, in each instance, the procedure there set out was treated as a rate changing method of general applicability. Since Congress was fully aware that relations between gas companies and their purchasers were typically fixed by contract (see S. Doc. No. 92, Part 84–A, 70th Cong., 1st Sess., pp. 133–134, 145–154, 164–214), it would seem that had Congress intended to excise contract rates from the filed rate procedure it would have included express statutory language to that effect, or at least have so indicated at some time during the consideration of the Act. This is particularly so since the effect of so excluding contract rates would cut down substantially the scope of Sections 4 (d) and 4 (e).

But there is no such indication. On the contrary, in describing the Act by sections, the committee reports state that 4 (e) "requires the filing of schedules and *contracts* relating to all rates and charges subject to the jurisdiction of the Commission; and, under the provisions of subsection (d), no change may be made in *such rates* except after 30 days' notice. Subsection (e) authorizes the Commission

to hold hearings concerning the lawfulness of *any proposed change* in rates, and to suspend such rates for not over 5 months, pending such hearing." [Emphasis added.] H. Rep. No. 709, 75th Cong., 1st Sess., p. 5; S. Rep. No. 1162, 75th Cong., 1st Sess., p. 4. The breadth of those statements, particularly the reference to "*any* proposed change," manifests an intent to include contract rates in the provision subjecting *all* changes in filed rates proposed by a natural gas company to the filed rate provisions of Sections 4 (d) and 4 (e). This broad scope was ascribed to these Sections by the Commission's Solicitor before the House Committee with respect to the similar provision of a predecessor bill. See Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., pp. 28–29.[26]

2. The court below believed that there were stronger indications in the legislative history

[26] "Mr. LEA. Mr. DeVane, under what conditions would rates be put into effect? That is, what would be the procedure?

"Mr. DEVANE. In the beginning?

"Mr. LEA. Yes.

"Mr. DEVANE. The companies will simply file their schedules.

"Mr. LEA. And those schedules would prevail unless the Commission saw fit to, after a hearing and notice, establish a rate?

"Mr. DEVANE. Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing

of a contrary congressional intent in accord with its holding. This it found in a colloquy between Congressman Halleck and a representative of the Illinois Commerce Commission, in which the latter stated that his commission intended to proceed under the proposed legislation to ask the Federal Power Commission to review the contract rates of Natural Gas Pipeline Co. (R. 149–150).[27] But since the discussion deals with a contemplated complaint by a state utility commission as to the

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are the rates that will continue in effect until they are changed either by the company, as provided in section 4, or by the Commission after hearing. * * *

"Mr. COOPER. And anyone who wants to file a complaint goes to the Commission; is that right?

"Mr. DEVANE. That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under Section 4 (d). After they have filed them with the Commission and announced those new rates, the Commission has the power to suspend and investigate, and the suspending power extends for a period of 5 months."

[27] As set out in the court's opinion, this colloquy was as follows (R. 149–150):

"Mr. HALLECK. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract *could* be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?

"Mr. BOOTH. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return upon the fair value of its property. [Emphasis supplied by court.]

"Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 4008, at page 43."

reasonableness of existing rates, Section 5 (a) would clearly be applicable (see *supra*, pp. 22–24), and hence the colloquy does not support the holding below as to the scope of Sections 4 (d) and 4 (e).

3. The Court of Appeals also derives comfort from the statements in the committee reports and floor debates that the Act contained "the usual provisions * * * such as we find in all regulatory measures enacted by Congress' and * * * 'there was nothing novel in its provisions'". (R. 150–151). See 81 Cong. Rec. 6722; S. Rep. No. 1162, 75th Cong., 1st Sess., p. 3; H. Rep. No. 709, 75th Cong., 1st Sess., p. 3; H. Rep. No. 2651, 74th Cong., 2d Sess., p. 3. In addition, the court noted that "there was virtually no opposition to the bill from any source" (R. 151). 81 Cong. Rec. 6725. Since, according to the court, the Commission's construction of Sections 4 (d) and 4 (e) was of "a radical nature" (R. 154), the conclusion was drawn that this legislative history supported its result.[28]

[28] The court also referred to the statement of the Congressman who introduced the amendment prohibiting the suspension of rates for industrial resale that its purpose was "to prevent suspension in cases of industrial use *where there were short term contracts*" [emphasis by court] (R. 152; 81 Cong. Rec. 6727). From this, the court drew the implications (1) that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates, and (2) that Congress did not visualize the situation where "one of the contracting parties is attempting

However, the Commission's reading of Sections 4 (d) and 4 (e) is not radical. Rather, as we shall now show, it accords not only with the accepted construction of the comparable provisions of the Interstate Commerce Act, on which Sections 4 (d) and 4 (e) were modelled, but also with the similar interpretations of the analogous provisions of state public utility regulatory statutes, which make widespread use of the filed rate procedure. In this light, there can be no doubt that, as applied by the Commission, the filed rate procedure of Sections 4 (d) and 4 (e) is not novel and does not depart from the usual regulatory provisions.[29]

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under the cover of the Act to avoid its contractual duties" (R. 152–153). Both implications lose all validity when it is remembered that the contracts Congressman Lea was talking about were not those between the natural gas company and its purchasers, such as is here involved, but rather between the purchaser and the company to which it resold the gas for direct industrial use; as to the latter, of course, the Commission has no jurisdiction under the Gas Act. Read in this light, the explanation simply was that since the contract for resale of the gas for industrial use was typically short term only, an increase in cost of the gas to the reseller could be adjusted and passed on with relative ease so that there would be little injury to the reseller in prohibiting suspension of increases proposed by the gas company.

[29] Since the Commission's reading of Sections 4 (d) and 4 (e) accords with the usual pattern of rate regulation, the reliance by the court below (R. 148) and by Mobile (Br. in Opp. in No. 17, p. 7) upon statements from this Court's opinion in *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, is misplaced. Also, as pointed out above (*supra*, pp. 31–33), the filed rate procedure, as ap-

B. THE FILED RATE PROCEDURE OF THE INTERSTATE COMMERCE ACT, ADOPTED IN THE NATURAL GAS AND FEDERAL POWER ACTS, APPLIES TO CONTRACT RATES

1. When the Federal Water Power Act was passed in 1920, Congress provided in Section 20 that rate regulation should be, as far as applicable, "according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce * * *." 41 Stat. 1063, 1074, 16 U. S. C. 813. In 1935, when Congress exercised its regulatory power over interstate electric utilities in Part II of the Federal Power Act and in 1938, when the Natural Gas Act was passed, the methods for changing rates in both Acts were specifically detailed; both were in substantially the same form,[39] and both were "taken bodily" from the Interstate Commerce Act, with a few pertinent changes. *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 806–807 (C. A. 4); see also *Northwestern Public Service Co.* v. *Montana-Dakota Co.*, 181 F. 2d 19, 22 (C. A. 8), affirmed, 341 U. S. 246.

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plied in this case, does not abolish or abrogate preexisting rights in the sense to which the Court was referring in *Niagara Mohawk*.

[39] The filed rate provisions of the Natural Gas Act, Sections 4 (d), (e), are essentially the same as corresponding sections in the Federal Power Act, Sections 205 (d), (e), *infra*, pp. 104–106. See Hearings before a Subcommittee of the House Committee on Interstate & Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., p. 28. The same likeness is evident in the complaint, hearing, and order procedure of both Acts. Natural Gas Act, Section 5 (a); Federal Power Act,

Examination of the Interstate Commerce Act reveals how clearly the rate provisions of the Gas Act (and the Power Act) parallel those of the earlier statute. Section 6 (3) of the Commerce Act, 49 U. S. C. 6 (3), *infra*, pp. 108–109, provides that no change shall be made in the rates filed and published pursuant to the Act except after thirty days' notice to the Interstate Commerce Commission and the public. Section 15 (7), 49 U. S. C. 15 (7), *infra*, pp. 111–113, goes on to declare that, whenever a schedule is filed stating a new rate, the Interstate Commerce Commission has authority to enter upon a hearing into the reasonableness of the proposed rate, suspend the proposed rate for a specified maximum period pending the outcome of the hearing, and if the Commission has not made its determination by the time the suspension period expires, the proposed rate goes into effect with the excess, if any, over a reasonable rate being subject to refund. This procedure is the same as the filed rate system of the Gas and Power Acts.

On the other hand, Section 15 (1), 49 U. S. C. 15 (1), *infra*, pp. 110–111—the analogue of Section 5 (a) of the Gas Act and Section 206 (a) of the Power Act—provides for a Commission hearing into the reasonableness of an existing rate upon complaint or upon the Commission's own motion; Section 13, 49 U. S. C. 13, *infra*, pp. 109–110, enumerates those who may make such a complaint.

When the Interstate Commerce Act's filed rate procedure first came before the courts, it was held that the rates filed and in effect under the Act were the only legal ones (*Kansas City So. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573; *Texas & Pac. Ry.* v. *Cisco Oil Mill*, 204 U. S. 449), and that such filed rates could not be affected by a subsequent agreement unless the later agreed-upon rate was made effective under the Act. *Kansas City So. Ry. Co.* v. *Albers Commission Co., supra.* When proposed rates were filed, the Commission's decisions whether to enter upon a hearing and whether to suspend the proposed rates pending a hearing were held to be within its administrative discretion. *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y.); *Merchant Truckmen's Bureau* v. *United States*, 16 F. Supp. 998 (S. D. N. Y.); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E. D. Va.); *M. C. Kiser Co.* v. *Central of Ga. Ry. Co.*, 236 Fed. 573 (S. D. Ga.), affirmed, 239 Fed. 18 (C. A. 5); see *Board of R. R. Comm'rs.* v. *Great Northern Ry. Co.*, 281 U. S. 412, 429. Rates which went into effect for failure of the Commission to suspend them, or upon the discontinuance of a rate proceeding, were described as "carrier-made rates." *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 687; *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370; *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 494 (E. D. Va.).

The impact of a change in rate, filed by the carrier, upon a contract-fixed rate—the precise issue in this case—was specifically considered by this Court in *Armour Packing Co.* v. *United States*, 209 U. S. 56. Armour made a six-months' contract with a railroad in June 1905, at the filed rate then in effect. An increase in the rate was filed by the railroad and published in August 1905, and then went into effect without hearing or order. Armour continued, however, to pay the contract rate. This Court held that the subsequently filed rate was the only legal rate and that Armour was properly convicted of violation of the Elkins Act (209 U. S. at 80–83). Justice Day, writing for the Court, summarized the equitable considerations advanced by Armour in favor of protecting the shipper and giving effect to the contract rate. 209 U. S. at 81–82. It might be, the opinion observed, that such contracts should be recognized, "giving stability to rates for limited periods", and that "the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done". 209 U. S. at 82. However, Justice Day went on to state that these were legislative considerations; the Act was clearly within the regulatory power of Congress and, under it, a filing by the carrier clearly changed the existing rate, even though the superseded rate was embodied in a private contract with a shipper (*ibid.*).

This square ruling is highly persuasive here, in accordance with the accepted principle that where provisions of one statute have been adopted by another, the interpretation which has been authoritatively placed upon the former applies to the latter also,[31] a principle which has already been applied to the rate provisions of the Gas and Power Acts. *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 806–807 (C. A. 4); *Northwestern Public Service Co.* v. *Montana-Dakota Co.*, 181 F. 2d 19, 22 (C. A. 8), affirmed, 341 U. S. 246; cf. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585.

While, in our view, *Armour* constitutes a clear decision by this Court sustaining the effectiveness, under the filed rate procedure, of a filing by a utility to supersede a rate embodied in a contract, the court below undertook to distinguish *Armour* (R. 150, fn. 10). Pointing out that, unlike the Interstate Commerce Act, the Natural Gas Act provides for filing of rate contracts and quoting the observation of Justice Day set out *supra*, p. 49, the Court of Appeals commented, "As we have seen this possible course outlined by the Supreme Court in *Armour* has been followed in the later Natural Gas Act" (R. 150, fn. 10). The Third Circuit thus took the view that, since

[31] E. g. *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65; *United States* v. *C. I. O.*, 335 U. S. 106, 112–113.

the Gas Act provides for the *filing* of rate contracts with the Power Commission, that single circumstance—without more and without regard to the further provisions of the Gas Act—made such contract rates immune from change by the gas company under the filed rate procedure.

(a). While the Interstate Commerce Act, without mentioning contracts, requires that "schedules showing all the rates, fares, and charges" be filed and kept open for public inspection (Section 6 (1), 49 U. S. C. 6 (1), *infra*, pp. 107–108), the Power Act and Gas Act supplement this requirement with a like filing requirement for "all contracts which in any manner affect or relate to such rates, charges, classifications, and services." Natural Gas Act, Section 4 (c); Federal Power Act, Section 205 (c). Similarly the Commerce Act's filed rate section and the complaint, hearing, and order provision refer to changes in rates but do not mention contracts, while the corresponding sections of the Gas and the Power Acts explicitly authorize changes in "rates * * * or in any * * * contract relating thereto." Natural Gas Act, Sections 4 (d), 5 (a); Federal Power Act, Sections 205 (d), 206 (a).[32] But there is a good reason for

[32] Another difference is that the Interstate Commerce Act and the Federal Power Act provide for suspension of all filed changes in a rate; the Natural Gas Act contains a similar provision except that it excludes from suspension proposed rates of gas for industrial resale. See Interstate Commerce Act, Sec. 15 (7); Federal Power Act, Sec. 205 (e); Natural Gas Act, Sec. 4 (e).

the difference, wholly apart from any cryptic attempt by Congress to change the *Armour* rule.

The difference in language and Congressional policy regarding rate contracts is explicable by the dissimilarity in nature of the industries being regulated. Railroads transport innumerable kinds and quantities of goods for many persons between various points on their lines and facilities must be available for all patrons. The Commerce Act's purpose to require uniform treatment of shippers could best be accomplished by requiring compliance with schedules of general applicability; permitting private contract rates would make even more complex the already elaborate railroad rate structure and, by the sheer weight of numbers, make the administrative burden unmanageable, with the result that the private contract would provide an easy way to circumvent the Commerce Act's prohibition against discrimination. Cf. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399.

The very large number of retail transactions involved in railroad rate regulation present an entirely different administrative problem from the relatively few wholesale interstate transactions regulated by the Gas and Power Acts. The latter typically require substantial investment in capacity and facilities for the service of the particular customers. Consequently, gas and power companies' relations with their customers

are ordinarily first arranged by contract and, because of the limited numbers of purchasers, control over the rates embodied in these contracts apparently was not expected to create a substantial administrative burden or to frustrate the prohibitions against preferential rates.[33]

In short, while Congress recognized contracts in the natural gas and electric utility fields, it had no purpose to endow them with a special status or greater dignity than other forms of rates; on the contrary, its aim was merely to eliminate, for the new legislation, the Commerce Act's prohibition on contracts and to give them the same status and the same dignity as the other forms of rates—to lift contracts to par, not place them on a higher plane.

(b). Accordingly, while the Gas Act, in Section 4 (c), *infra*, p. 101, recognizes contracts relating to rates by providing for the filing of such contracts with the Commission, the Act does not give them an immunity from change denied under the Interstate Commerce Act or denied to other rate forms under the Gas Act. Rather, as we have already pointed out (*supra*, p. 51), Section 4 (d) goes on to make the filed rate procedure available to change rates embodied in contracts; in

[33] The same attitude is evident in a number of state regulatory schemes, in which, similarly, the regulation of railroads ignores contracts while other utilities are ordered to keep their rate contracts on file. See N. Y. Public Service Law, Secs. 28, 66 (12), 80 (10), 92 (1); Wash. Rev. Code, Secs. 80.28.040, 80.28.050; Wisc. Stat., Secs. 195.08 (2), 196.19 (2).

explicit language, that Section provides that it is to apply to rate changes proposed by a gas company "in any such rate, charge, classification, or service, or in any rule, regulation, or *contract relating thereto.*" [Emphasis added.] See, also *supra*, pp. 28–29. Having recognized (but not elevated) rate contracts, Congress made appropriate additions to the filed rate provisions of Sections 4 (d) and 4 (e), as well as in Section 5 (a), which make it clear that the procedures for changing rates contained in the Interstate Commerce Act are carried over *in toto* to the Gas and Power Acts.

Mobile (Br. in Opp. in No. 17, p. 7–8) and the court below (R. 150, fn. 10) are thus in error when they say that in the Gas Act Congress adopted the suggestion referred to in the *Armour* opinion (*supra*, p. 49). What Congress did was merely to accede to the making and filing of rate contracts, but it continued the procedure of the Commerce Act of permitting the company to propose rate changes under the filed rate procedure even though the existing rate is embodied in a contract. As in the Commerce Act, "There is no provision excepting special contracts from the operation of the law". *Armour Packing Co.* v. *United States*, *supra*, 209 U. S. at 81. See, also, *infra*, pp. 67–68.

Had Congress desired to give contracts such a special status, it surely would have said so in terms more explicit than the simple provision for

filing "contracts", on which Mobile must rest; qualifications and limitations would have been spelled out.[34] There would probably also have been legislative commentary explaining this significant departure from the Commerce Act. Instead, Congress referred to the "usual provisions" of regulatory legislation and insisted that "nothing novel" was being done. See *supra*, pp. 44–45. Plainly, the *Armour* decision fully supports the Commission's position.

C. THE OVERWHELMING MAJORITY OF STATE UTILITY STATUTES PROVIDE A FILED RATE PROCEDURE APPLICABLE TO UTILITY-PROPOSED RATE CHANGES EVEN THOUGH THE EXISTING RATE IS EMBODIED IN A CONTRACT

The Gas and Power Acts must also be viewed against the background of state regulatory schemes. The overwhelming majority of these state statutes provide a filed rate procedure comparable to that of the Gas and Power Acts, as well as that of the Interstate Commerce Act which apparently has been the model in this area. See *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.*, 149 Ark. 502, 506; *Antioch Milling Co.* v. *Public Service Co.*, 4 Ill. 2d 200, 204–205. And this Court upon at least two occasions, as well

[34] Mobile neglects to note, for instance, that Mr. Justice Day referred only to contracts "for limited periods." 209 U. S. at 82. If Congress had intended to incorporate the suggestion that contracts should be immune from change by filing, it would have considered such time limitations. Moreover, the contract rates to which Mr. Justice Day was referring would, he thought, be "open to all." 209 U. S. at 82. That is not uniformly true under the Gas Act.

as other courts with but little dissent, have upheld the application of the filed rate procedure to utility-proposed changes in rates even though the existing rate was embodied in a contract. Although some states have introduced modifications in the filed rate procedures—modifications explicitly spelled out in statutes—Congress chose in the Gas and Power Acts to incorporate the "usual," "standardized" filed rate provisions (*supra*, pp. 44–45), rather than the deviations followed by a few states. Moreover, even in the states which substantially modify the filed rate system in their legislation, no special status is given to contract rates except in Connecticut and Washington (in part), where it has been done by specific statutory provision.

1. *The majority practice.*—(a). The regulatory statutes of more than 30 states contain a filed rate procedure the terms of which authorize a utility to put rate changes into effect without affirmative action by the regulatory agency, and do not prohibit the use of the filed rate procedure for utility-proposed changes in contract rates.[35]

[35] Ala. Code Tit. 48, Secs. 53, 54, 111, 113; Ariz. Code Ann., Sec. 69–246 (inapplicable to rate increase); Ark. Stat. Ann., Secs. 73–117, 73–217; Calif. Public Utilities Code, Secs. 454, 455, 491 (inapplicable to rate increase); Colo. Stat. Ann., c. 137, Secs. 47, 48; Del. Code Ann., Tit. 26, Secs. 151–57; Idaho Code, Sec. 61–307; Ill. Rev. Stat., c. 111⅔, Sec. 36; Iowa Code, Secs. 479.61–.69; Ky. Rev. Stat., Secs. 278.180, 278.190; Me. Rev. Stat., c. 44, Secs. 30, 35, 36; Md. Ann. Code, Art. 78, Secs. 29 (b), 30; Mass. Ann. Laws, c. 159, Secs. 19, 20; Mich. Stat. Ann., Secs. 22.29, 22.91; Mo. Stat. Ann., Secs.

Some expressly authorize, as do the Gas and Power Acts, the use of the filed rate procedure for a "change in contracts," (Ill. Rev. Stat., c. 111 2/3, Sec. 36; Mass. Ann. Laws, c. 159, Sec. 19; N. Y. Public Service Law, Secs. 66 (12), 92 (2), 80 (10); Wash Rev. Code, Sec. 80.28.060) and, in others, the procedure is expressly made applicable by the inclusion of "contracts" in the statutory definition of "rates" (Iowa Code, Secs. 479.48, 479.66; N. Car. Gen. Stat. Secs. 62–65 (f), 62–71).[36]

387.070, 387.200; N. H. Rev. Laws, c. 292, Secs. 3–8; N. J. Stat. Ann., Sec. 48:2–21; N. M. Stat., Secs. 68–6–7, 69–7–18; Nev. Comp. Laws, Sec. 6113; N. Y. Public Service Law, Secs. 29, 66 (12), 92 (2), 80 (10); N. C. Gen. Stat., Secs. 62–71, 62–72, 62–125, 62–126; N. D. Rev. Code, Secs. 49–0505, 49–0506; Ore. Comp. Laws Ann., Secs. 112–429, 112–4,134, 112–4,135, 113–112, 113–116; Pa. Stat. Ann., Tit. 66, Sec. 1148; R. I. Gen. Laws, c. 122, Sec. 45; S. C. Code, Secs. 58–114, 58–115, 58–402, 58–404; S. D. Code, Secs. 52.0212, 52.0217 (inapplicable to rate increase); Tenn. Code, Sec. 5451 (d); Vt. Stat., Secs. 9375, 9376, 9613, 9615; Va. Code, Secs. 56–237, 56–238, 56–240; Wash. Rev. Code, Secs. 80.04.130, 80.28.060, 81.04.130; W. Va. Code, Sec. 2556; Wisc. Stat., Secs. 195.08 (7, 9), 196.20.

[36] While many of these statutes authorize suspension of the proposed rate pending a hearing as to reasonableness, there are numerous parallels to Section 4 (e)'s prohibition against suspension of rates for industrial resales. New Jersey, Oregon and Vermont authorize suspension only when the proposed change in the schedules is for an increase in rates. N. J. Stat. Ann. 48:2–21 (d); Ore. Comp. Laws Ann., Secs. 4,134, 4,135; Vt. Stat., Secs. 9375, 9376. In Oregon, it has been accordingly held that there was no authority to suspend a proposed reduction in rates. *Union Pac. R. R. Co.* v. *Bean*, 167 Ore. 535. In New York, before Laws 1921, c. 134, Sec. 42, changes filed by gas companies and other public service companies could not be suspended, although changes proposed by

(b). Where, under these statutes, the purchaser has sought to urge, as Mobile does here, that the filed rate procedure may not be invoked by the utility to effectuate a change in the rate fixed by the contract, the courts, with limited exceptions,[37] have uniformly rejected the contention and held that the procedure applied to such rate changes. *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.*, 149 Ark. 502; *City of Lamar* v. *Town of Wiley*, 80 Colo. 18, 20; *Denver & South Platte Ry. Co.* v. *City of Englewood*, 62 Colo. 229, writ of error dismissed, 248 U. S. 294; *Kansas City Light & Power Co.* v. *Midland Realty Corp.*, 338 Mo. 1141, affirmed, 300 U. S. 109; *N. J. Suburban Water Co.* v. *Town of Harrison*, 120 N. J. L. 546, reversed on other grounds, 122 N. J. L. 189;[38] *Public Service Commission* v.

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railroads could be. *Pub. Serv. Comm.* v. *Iroquois Natural Gas Co.*, 184 App. Div. 285, 286–87, affirmed, 226 N. Y. 580. In some states the opposite is true. There is no provision for suspending proposed changes by carriers while other utilities' filings can be suspended. Ala. Code, Tit. 48, Secs. 53, 54, 113; N. Mex. Stat. 68–6–7, 69–7–18. In Maine, a proposed change in rates may be suspended except that, where filed by a railroad, it may not be suspended unless it is related to a tariff filed before the Interstate Commerce Commission and the ICC has suspended the latter tariff. Maine Rev. Stat. c. 44, Secs. 35, 36.

[37] The exceptions are: *Commonwealth of Virginia ex rel. Page Milling Co.* v. *Shenandoah Light & Power Corp.*, 135 Va. 47, and *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (D. R. I.). These two cases are discussed *infra*, p. 80, fn. 52.

[38] *N. J. Suburban Water Co.* was reversed on the ground that the utility was estopped from claiming that the paper which had been filed served as a schedule of increased rates.

Pavilion Natural Gas Co., 232 N. Y. 146; *Town of North Hempstead* v. *Public Service Corporation*, 231 N. Y. 447; *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243; *Duquesne Light Co.* v. *Public Service Commission*, 273 Pa. 287; *North Coast Power Co.* v. *Public Service Commission*, 114 Wash. 102; *Minneapolis, St. P. & S. S. M. R. Co.* v. *Menasha W. W. Co.*, 159 Wis. 130, affirmed, 245 U. S. 633. There has been recognition of this principle in *dicta* in still other cases. See *Rugg* v. *Davis*, 320 Mass. 388; *Interborough Rapid Transit Co.* v. *Gilchrist*, 26 F. 2d 912, 919 (S. D. N. Y.), reversed on other grounds, 279 U. S. 159.

In each of these cases, the utility filed rates which were higher than rates previously fixed by contract and which went into effect because not suspended by the commission or because, as in the New York cases, there was no power in the commission to suspend. The purchasers complained, as does Mobile here, that since the existing rate was embodied in a contract, increases could not be made under the filed rate procedure but rather only after a determination by the regulatory agency that the existing contract rates were unreasonable. In rejecting these contentions, the Supreme Court of Pennsylvania in *Suburban Water Co.* v. *Oakmont Borough*, *supra*, after describing the filed rate procedure in terms

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The Court of Errors and Appeals assumed, however, that if it had been such a schedule, it would have been effective to supplant the contract rate, as held by the lower New Jersey court. See 122 N. J. L. at 190–91.

comparable to the Gas Act procedure (268 Pa. at 247–248), pointed out that "the rate is at all times subject to the determination of the commission that it is just and reasonable, and it may be changed by the utility in the manner prescribed by law" (268 Pa. at 248–249), and stated (268 Pa. 248, 250):

> * * * [W]hether the complaint is filed before or after the thirty-day period, if the utility has complied with the provisions of the statute, the rates become effective "at the time [fixed by the schedule in its notice of publication] when the proposed change will go into effect"; the effective date is the date made by the company when the proposed change of rates shall apply to its service, after being duly promulgated according to the statute. A rate becomes, on the effective date, an effective rate, and, as such, it is a collectible rate, or one that may be sued for.
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> * * * * * *
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> * * * It is the effective, collectible and suable rate, duly published as required by the act, and remains as such, governing the charges to be made pending the investigation until the commission "shall determine and prescribe by a specific order the maximum, just, due, equal and reasonable rate * * * to be *thereafter established, demanded, exacted, charged or collected.*"

And, again, in *Duquesne Light Co.* v. *Public Service Commission, supra,* the Pennsylvania court

> * * * The changes made materially altered the rates to him and to all other consumers; but, as to the contracts on which appellants base their complaint, only changed the tariff rates specified therein in exactly the way the law provided they could be changed.

Similarly, in *Public Service Commission* v. *Pavilion Natural Gas Co., supra,* where the contract relied on antedated the enactment of the regulatory statute, the New York Court of Appeals ruled (232 N. Y. at 150–151):

> This provision of the statute was in force when certain of the towns and villages gave their consent to the defendant to maintain and operate its gas mains within the municipalities. This court has held, as to similar consents (*Town of North Hempstead* v. *Public Service Corp. of L. I.*, 231 N. Y. 447) that by implication the statute became a part of the terms of the consent, and that a gas company on complying with the statute was empowered to abrogate the rates stipulated in the franchises or agreements, and to put into operation a new schedule of just and reasonable rates and charges. The right, therefore, of the gas company to file a schedule increasing the rates as to all franchises and agreements given or entered into subsequent to the time when subdivision 12 became effective has been settled and determined by this court. The right, however, to increase rates specified in franchises and agree-

ments made prior to that time was not passed upon in the *North Hempstead* case. That question is now presented, since some of the franchises or agreements here under consideration were made or entered into prior to the time the statute, in its present form, took effect. It is argued that as to them there is no power on the part of a gas company to increase its rates. But I am of the opinion that the same rule applied to them. There was implied in all of such franchises or agreements, and coupled with the terms thereof, a provision that the legislature, in the exercise of its powers, might thereafter, either itself, or acting through another, regulate the rates thus fixed, and increase or lower them. There is nothing in the statute to indicate that the right of a gas company, of its own motion, to file a schedule of rates is to apply only to franchises or agreements as to rates thereafter entered into. The reason which induced this court to hold that a gas company might increase its rates as to agreements or franchises granted after the amendment of 1910 applies equally to those theretofore granted. So that under the statute as it now stands, a gas company has the legal right to increase its rates and made the increase effective thirty days after filing with the commission its schedule of new rates. If complaint be filed with the commission against the proposed increase, or if the commission itself sees fit to act without a complaint, then a hear-

> ing may be had before the public service commission as to the propriety of the proposed increase. At the conclusion of such proceeding the commission is clothed with power, if the new rate be found excessive, to annul or modify it according as the facts developed justify. * * *.

As summarized by the Arkansas Supreme Court more than thirty years ago, in *Harrison Electric Co.* v. *Citizens' Ice & Storage Co.*, *supra*, 149 Ark. at 506–507:

> * * * Nor does the statute require an affirmative order of the commission authorizing that the new rates be put into effect. The rates become effective upon the maturity of the period of thirty days specified in the schedule, unless there is an order of the commission suspending the rates pending a hearing.
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> * * * * *
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> We are of the opinion, therefore, that the schedule of increased rates promulgated by appellant was valid, and, the statute having been complied with, the new rates superseded any contractual rates theretofore established between the parties. There could be no valid contract as against the power of public control by the commission. It would not constitute an impairment of the obligation of the contract for the new rates to be put into effect under the control of the Commission.[39]

[39] See also *supra*, p. 25, fn. 13.

(c). Two of the state cases arising under filed rate procedures came before this Court. In both, this Court recognized the propriety of using such procedures to change contract rates. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109, affirming 338 Mo. 1141; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.*, 245 U. S. 633, affirming 159 Wisc. 130.

In *Midland*, plaintiff (the utility) and defendant (the realty company) had contracted for the furnishing of steam at specific rates. In June 1917, plaintiff filed a schedule increasing the applicable rates which then went into effect. Upon subsequent complaint of customers of the utility other than defendant, the state commission found the filed rates unreasonable and fixed just and reasonable rates effective March 1918, which were higher than the contract rates and lower than the filed rates. Defendant refused to pay the filed rate before March 1918 or the rate fixed by the commission thereafter. It contended that the contract rates could not be altered except upon an express finding of unreasonableness. The Missouri Supreme Court found that both the filed rate (before March 1918) and the rate fixed by the commission (after March 1918) had to be paid, holding that "the filing by plaintiff of the rates effective August 1, 1917, primarily fixed by plaintiff's schedule were in the circumstances the effective rates *pro tempore*, though their reason-

ableness was not thereby finally determined." 338 Mo. at 1147. Distinguishing *Wichita Railroad and Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, on which the court below relied (see *infra*, pp. 72–80), the Missouri Supreme Court stated (338 Mo. at 1130–1151):

> Under the construction our court has placed upon our statute authorizing substituted rates for existing rates the statute does not require any finding of facts, or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917. As regards the commission's schedule of substituted rates of March 1, 1918, it does appear that the same rested upon an express finding of facts and orders of the commission as foundational. * * *.

In affirming, this Court rejected the defendant customers' constitutional attack and, in addition, noted (300 U. S. at 113–114):

> * * * There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties were bound by the contract. But the State has power to annul and supersede rates previously established by contract between utilities and their customers. * * * [Petitioner] here insists that the contracts could not be abrogated "without a proper hearing, finding and order of the

> commission with respect thereto." It does not, and reasonably it could not, contend that immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates. It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature.[40]

In the *Menasha* case (*supra*, p. 64), plaintiff-railroad sued to recover the rate set forth in a filed tariff. Defendant-customer relied on a prior contract specifying rates which, it claimed, could not be abrogated. The Wisconsin court held that "(w)hen the plaintiff filed its tariffs covering the freight rates for the transportation of the freight

[40] Mobile has sought to distinguish *Midland* on the ground that in Missouri all private rate contracts had been rendered unlawful, citing *State ex rel. Sedalia* v. *Pub. Serv. Comm'n*, 275 Mo. 201 (Br. in Opp. 6). But that case stands only for the familiar proposition that "no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates * * *." (275 Mo. at 212), even though the contract had been made, before the enactment of the regulatory act, by a city authorized to make it. The rule in Missouri, as elsewhere, is that contract rates may be superseded by rates made pursuant to the regulatory statute and that the state's police power can never be restricted by contract. *Kansas City Light & Power Co.* v. *Midland Realty Corp.*, 338 Mo. at 1148, 1150–51.

included in the contract, the latter became inoperative. The state had then, through the instrumentality and by the method by it prescribed, fixed another rate which became the only lawful rate till changed as provided for in the act." 159 Wisc. at 136. This Court affirmed without opinion, citing *Armour* (*supra*, pp. 49–50) and other cases under the Interstate Commerce Act. 245 U. S. 633.

Menasha, like *Armour*, concerns the regulation of railroads, and, as in *Armour*, the importance of avoiding secret contracts was stressed. 159 Wisc. at 137. In Wisconsin, as under the Interstate Commerce Act, there is no provision for the filing of railroad contracts, although contracts of other utilities are to be filed. Wisc. Stat. 195.08 (2), 196.19 (2). And it was such absence of a provision for the filing of contracts in the Interstate Commerce Act which was relied on by the court below to avoid the impact of *Armour* on the theory that when a legislature provides for filing of contracts it thereby intends to preserve the contract rates until changed by order of the commission. See *supra*, pp. 50–51. It is therefore pertinent to note that there is not the slightest suggestion in the state cases that the effect of the filed rate procedures on contracts is limited by the enactment of a provision for filing contracts. On the contrary, the decisions cited above (*supra*, pp. 58–59), upholding the effectiveness of filed rates

vis-a-vis prior contracts, in Colorado, New York, Pennsylvania, and Washington, concerned utilities whose contracts are required to be on file with the state commissions. Colo. Stat. Ann., c. 137, Sec. 16; N. Y. Pub. Serv. Law, Sec. 66 (12); Pa. Stat. Ann. Tit. 66, Secs. 1102 (22), 1142; Wash. Rev. Code, Sec. 80.28.050. And in one of these cases, the court explicitly assumed that the contract involved was on file as required by law. *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243, 247.

2. *Minority positions.*—We have just described the majority practice—legislative provision for a filed rate procedure comparable to that of the Gas and Power Acts and applying that procedure to contract rates such as Mobile's. A minority of legislatures take a different view, requiring commission approval of changes before they can become effective, but (i) only in Connecticut and Washington (in part) are contract rates treated differently from other rate forms, (ii) in all states (except Virginia and possibly Rhode Island[41]) where substantial modifications in (or departures from) the filed rate procedure have been made, the changes have been explicitly made by legislation, and (iii) in no case (so far as we have been able to discover) has a reported judicial decision done what the court below did here—excepted contract rates from a filed rate procedure comparable

[41] For cases so interpreting the Virginia and Rhode Island legislation—which on its face is comparable to that of the federal acts—see fn. 52, *infra*, p. 80.

to that in the Gas and Power Acts, while leaving other rate forms subject to that procedure.

(a). A few state statutes expressly forbid any rate change proposed by a utility, whether or not embodied in a contract, from taking effect without prior approval, concurrence, or findings as to reasonableness by the state regulatory agency. (Kan. Gen. Stat. Ann., Sec. 66–117; Montana Rev. Code, Sec. 70–113; Hawaii Rev. Laws, Sec. 4715.) And some state statutes, still without differentiating contract rates, provide the filed rate procedure in its usual form except that a filed increase in rates is made ineffective until approved or until findings are made as to its reasonableness. Ariz. Code Ann., Sec. 69–246; Calif. Pub. Util. Code, Sec. 454; S. Dakota Code, Sec. 52.0212; see Ohio Code, Sec. 4909.17.[42] This also was the law in Illinois until 1921. *Antioch Milling Co.* v. *Pub. Serv. Co.*, 4 Ill. 2d 200, 204. In Michigan and Wisconsin, the filed rate procedure applies to rates of carriers but approval is required for increases in rates proposed by other utilities. Mich. Stat. Ann., Secs. 22.13 (6a), 22.1320; 22.29 (b); Wisc. Stat., Secs. 195.08 (7), 196.20 (2).[42] Of course, to the extent that these statutes do not differentiate between

[42] Wherever commission action is required to make a change in rates effective, the absence of such approval, of course, makes any proposed change inoperative. *City of New Haven* v. *New Haven Water Co.*, 432 Conn. 496, 563; *City of Defiance* v. *Toledo Edison Co.*, 47 Ohio App. 100, 106; *Great Northern U. Co.* v. *Pub. Serv. Comm.*, 88 Mont. 180.

changes in contract rates and in other rates, they have little bearing on the construction of the Gas Act's filed rate procedure. The different procedures provided by these statutes apply equally to non-contractual and contractual rate changes.

(b). In only two states is there any differentiation made in the applicable procedure when the utility seeks to change rates embodied in private contracts. In Connecticut, the legislature has enacted as part of its statutory pattern the exception which the court below read into the Natural Gas Act. The filed rate procedure may be used by Connecticut utilities to change existing rates except where those rates are fixed pursuant to contract. Conn. Gen. Stat., Secs. 5409, 5411.[43] In such

[43] The Connecticut statute, Sec. 5411, provides in pertinent part:

"Whenever any rate of any public service company chartered by or organized under the laws of this state shall exist or shall be charged pursuant to charter, contract or any agreement or understanding, and shall be in whole or in any respect discriminatory or more or less than just, reasonable and adequate to provide properly for the public convenience, necessity and welfare, such company or any town, city or borough within which or between which and any other town, city or borough in this state, any such company is furnishing service, or any ten patrons of any such company, may bring a written petition to the commission alleging that such rate is discriminatory or more or less than just, reasonable and adequate. Thereupon the commission shall fix a time and place for a hearing upon such petition and shall mail notice thereof to the parties in interest and give due public notice thereof at least one week prior to such hearing. Upon such hearing, the commission may, if it shall find such rate to be discriminatory or more or less than just, reasonable and adequate to enable such company to

situations, "where a company desires to increase its rate schedule above that specified in a contract with any city, it could do so only by petition to the commission, a finding by it that there was ground for increased charges and an order prescribing the rates to be thereafter charged." *City of New Haven* v. *New Haven Water Co.*; 132 Conn. 496, 503. The Washington legislature has limited this express protection to those contracts which were in effect at the time its regulatory statute was enacted (Wash. Rev. Code 80.28.120), and the Washington Supreme Court has read its statute in accordance with its plain terms by holding that it does not protect subsequent contract rates from change by a new rate filing by the utility. *North Coast Power Co.* v. *Pub. Serv. Comm.*, 114 Wash. 102, 107–09; see, also *State ex rel Seattle* v. *Public Service Commission*, 76 Wash. 492."

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provide properly for the public convenience, necessity and welfare, determine and prescribe just and reasonable maximum rates or charges to be thereafter made by such company."

" In the *Seattle* case, the Washington Supreme Court stated (76 Wash. at 501):

"So it is apparent that the affirmative consent of the commission to change that rate in the manner provided by § 28 [the filed rate procedure section] was not required, though the commission had the power to suspend and adjudge such new rate unreasonable and, in that manner only, prevent it becoming effective. The provisions of § 84 lend additional support to the view that the proposed new rate of the lighting company, which was properly noticed and filed, becomes automatically effective, subject to be defeated by the commission only in the manner already indicated."

3. *The Wichita Railroad case.*—While recognizing that this Court's *Midland* decision (*supra*, pp. 64–66) lends "some support" to the Power Commission's position (R. 145), the court below chose instead to rely on *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, where the Kansas Commission, acting under Kansas law, ordered a surcharge after a hearing, without any finding of unreasonableness and despite a duly filed contract for the sale of electric power (R. 145). In a suit resting on the diversity jurisdiction of the federal courts, the Eighth Circuit upheld the state commission. On appeal, this Court, applying Kansas law, sustained the objections of the purchasing streetcar company on the basis of the interpretation of the Kansas statute adopted by the Kansas Supreme Court in *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1, to the effect (R. 146) that "rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates." 260 U. S. at 58. The Third Circuit justified its reliance here on *Wichita* on the ground that (R. 146):

> The Kansas procedure as to rates bears great similarity to the Natural Gas Act formula. Under Section 20 of that state's public utility statute a public utility may file higher rates. Section 13 of the law empowers the Commission to set aside rates

> which after hearing have been found to be unreasonable. It is under the parallel provision in the Natural Gas Act, (Section 5 (a)) that petitioner contends the Commission should have functioned in passing upon United's attempt to obtain a higher rate for its gas sold to Mobile for the industrial user Ideal. * * *

(a). This reliance, we believe, was entirely without merit.[45] We have already shown, *supra*, pp. 46–68, that the procedure accepted both by this Court (under the Interstate Commerce Act) and

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[45] The discussion in the text is also applicable to the other cases, such as *Hinkel Dry Goods Co.* v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (C. A. 10); *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1; *Railroad & Light Co.* v. *Court of Industrial Relations*, 113 Kan. 217—cited by the court below (R. 146, 149) and by Mobile (Br. in Opp. in No. 17, pp. 9–10)—which involve the same Kansas statute. *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U. S. 379, and *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232, also cited by Mobile, are easily distinguishable. The *Arkansas Natural Gas* case holds that the undoubted authority of a state to "exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts" (261 U. S. at 382) can be exerted only in the public interest and not merely to relieve a contracting party from the burdens of an improvident undertaking. 261 U. S. at 383. In the *Southern Utilities* case, where the utility sought to avoid a contract with a city on the ground that, since the legislature had power to change the rates, the contract was void for lack of mutuality, the court ruled that "the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed." 268 U. S. at 233.

by the overwhelming majority of the states under their regulatory statutes is just the opposite. Consequently, the Kansas interpretation of its statute, while permissible on constitutional grounds, represents the rate regulatory procedure of a very limited minority of states. In these circumstances, it could hardly be said that in adopting the "usual provisions * * * such as we find in all regulatory measures enacted by Congress" (81 Cong. Rec. 6722), Congress intended to incorporate into the Gas and Power Acts the Kansas procedure, different as it is from that provided in the bulk of the state statutes as well as in other federal legislation.

(b). Moreover, examination of the Kansas statute[46] involved in *Wichita* reveals that, far from bearing a great similarity to the "Natural Gas Act formula," the procedure there provided is entirely different, and the Kansas statute does not contain a filed rate procedure comparable to Sections 4 (d) and 4 (e) of the Gas Act. It contains no provision permitting rates to go into effect without commission action; Section 20, *infra*, pp. 117–118, does provide for the filing of proposed rate changes by a utility, but under that Section no proposed rate changes may be effective "without the consent of the commission". Moreover, while under Section 20 of the Kansas statute the commission may consent to the filing without holding a

[46] For the Court's convenience, the pertinent provisions of the Kansas statute are set out *infra*, pp. 113–117.

sion of rates for sales for industrial resale. See *e. g.*, Annual Reports of the Federal Power Commission for 1951, 1952, 1953, and 1954, at pp. 144, 152, 154, and 169–70, respectively.[55]

D. Mobile's position might rectify what it considers an injustice in this particular case—an inequity stemming, if it exists at all, solely from the Congressional prohibition on suspension of rates for sales for industrial resale. But its argument, if accepted, would also necessarily result in an unjustified disparity of treatment of the different forms of rates. As we have pointed out (*supra*, pp. 25–28), there are very good reasons why private contract rates should not be singled out and why all rate forms deserve the same treatment; only two states (one only in part) make the distinction in their legislation (*supra*, pp. 70–71). If it be a question of "balancing equities", there is surely no guide which enables the Court—which is not Congress—to relieve distributors who have contract rates, at the cost of discriminating against those with other kinds.

E. Another factor to be considered is the added burden, both on the Commission and the parties, of the increased number of hearings which will probably have to be held if the Commission is to

[55] There is now a bill pending before Congress, which, among other things, would eliminate the prohibition against suspension of rates for sales for resale for industrial use. S. 1880, 84th Cong., 1st Sess.

hearing (*City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 409), there is no separate provision for hearing as to the reasonableness of the proposed rate, etc.—comparable to the procedure contained in Section 4 (e) of the Gas Act—where there are objections or complaints to the proposed rate change. Instead, upon complaint, a hearing is held under Section 13, *infra*, pp. 114–115, which as the court below noted, is similar to Section 5 (a) of the Gas Act. On the basis of this hearing, the commission must determine, with adequate findings of fact, whether the existing rate is unreasonable and, if so, it must prescribe a new rate.

Under such a procedure—very different from the Gas Act's filed rate procedure (*supra*, pp. 20–22)—it is understandable how the Kansas courts could hold that the filing of a new schedule by the utility, without more, does not abrogate a prior contract and that "rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates" (95 Kan. 1, quoted in 260 U. S. at 58). Further, it is clear why this Court sustained the objection to the rate there involved, since the Kansas commission's sanctioning of a new rate was not supported by adequate findings of fact.

(c). It is as plain as can be that this Court was applying only Kansas law. See 260 U. S. at

be required to enter upon a hearing as to the reasonableness of the existing contract rate before accepting a gas company's increase for filing. It has been the Commission's practice to hold hearings only when its preliminary study of the proposed increase indicated that need; even with the number of hearings so limited, the heavy volume of rate increase proposals has resulted in a substantial delay between the filing and the Commission's final disposition of the requested increase. The many additional hearings probably required by the holding below would further increase the administrative load of the already overburdened Commission[56] and result in even more delay in Commission action on rate increases needed by the gas companies to offset constantly rising costs. This extra burden and delay should not be imposed in the absence of the best of reasons, and at any rate, it should be weighed in the balance against Mobile's claims of unfairness.

IV

THE FILED RATE PROCEDURE AS APPLIED BY THE COMMISSION HAS BEEN JUDICIALLY RECOGNIZED AND APPROVED

Apart from the instant case and *Sierra Pacific Power Co.* v. *Federal Power Commission*,

[56] The Commission's already heavy administrative burden has recently been further augmented as a result of this Court's decision in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672.

53–54, 55–59.[47] So was the Circuit Court of Appeals, when, in addition to holding that there was no constitutional objection to an order changing prior contract rates, it ruled that an express finding of unreasonableness was not required under Kansas law: 268 Fed. 37, 42, 43–44. And see fn. 50, *infra*, pp. 78–79.

Nevertheless, some point has been made that Chief Justice Taft's statement in *Wichita*, that "[t]his conclusion accords with the construction put upon similar statutes in other States" (260 U. S. at 58) means that, contrary to our view

[47] *E. g.*: "The proceeding we are considering is governed by § 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.

"* * * In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

(*supra*, pp. 56–68), the Kansas system is typical of state regulatory procedures. But it is plain from the context of the remark, as well as the cases the Chief Justice cited to support it, that he was referring only to the immediately preceding portion of the opinion holding that, where the legislature requires a full hearing and findings, an administrative order without adequate findings is void. The cases cited—*Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405[48]—did not involve or affect contract rates in any way. In *Springfield*, the issue was whether an attack on an interstate railroad's rule of distribution of cars was within the jurisdiction of the Interstate Commerce Commission or the state commission; *Baltimore & Ohio* involved the propriety of a commission order fixing rates and discussed general principles of rate-making. The only possible point in those Illinois cases to which this Court could have referred relates to the requirement of sufficient and definite administrative findings as necessary to support a commission's jurisdiction and to enable a court to review commission

[48] While no filed rate procedure was involved in these cases, it may be noted in passing that, when they were decided, Illinois law was similar to Kansas' and did not permit any increase in rate except on finding and order of the commission. The filed rate procedure was subsequently adopted in Illinois in 1921. *Antioch Milling Co.* v. *Pub. Serv. Co.*, 4 Ill. 2d 200, 203–204.

orders fixing rates and to determine the propriety of valuations found. See 281 Ill. at 411–12; 291 Ill. at 234–36.[49]

(d). That ~~this Court's~~ opinion in *Wichita* was so limited has been generally accepted. Of the more than seventy-five state and federal references to the *Wichita* decision, nearly all citations have been for the proposition that, where a statute requires a finding as a basis for administrative action, the action is invalid without it (*e. g., Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464; *Kosciusko County* v. *Pub. Serv. Commn.*, 225 Ind. 666, 675; *Central R. Co. of N. J.* v. *Dept. of Public Utilities*, 7 N. J. 247, 261),[50] or for the

[49] *Wichita* has been relied upon in Illinois for the same point which this Court in *Wichita* drew from the two Illinois cases, *i. e.*, that an administrative agency must make sufficient findings when required by statute or its order will be void (*e. g., Central Northwest Business Men's Ass'n.* v. *Illinois Commerce Commission*, 337 Ill. 149, 158; *Chicago Rys. Co.* v. *Illinois Commerce Commission*, 336 Ill. 51, 62–66) and must in other respects follow the course of action prescribed by the legislature (*Lambdin* v. *Illinois Commerce Commission*, 352 Ill. 104, 107).

[50] The Kansas Supreme Court has also accorded such a construction to *Wichita*. In *Consolidated Flour Mills Co.* v. *Kansas Gas & Electric Co.*, 119 Kans. 47, the Kansas court held that the order of the commission involved in *Wichita* did effectively abrogate the rates fixed by prior contract of the utility with another customer, although the court recognized that the *Wichita* decision had found the same order void on the grounds that it did not contain an express recital that the existing rate was unreasonable. Since, however, *Wichita* was based upon a construction of the Kansas statute rather

more general principle, also enunciated in *Wichita* (260 U. S. at 58–59), that the legislature must prescribe sufficient guides for administrative action which the agency must follow—*e. g., Darweger* v. *Staats*, 267 N. Y. 290, 305; *Van Winkle* v. *Fred Meyer, Inc.*, 151 Ore. 455, 469; *Holgate Bros.* v. *Bashore*, 331 Pa. 255, 263.[51]

In view of the nature of its holding and discussion, this Court's *Wichita* opinion plainly does not apply here where, as sharply demonstrated by the Missouri Supreme Court in the *Midland* case (*supra*, pp. 64–66), the statutory requirements are so very different. 338 Mo. at 1150. Pointing out that this Court had accepted the construction given the Kansas statute by the state court (338 Mo. at 1150), the Missouri court noted, in a statement fully applicable here (*ibid*):

> Under the construction our court has placed upon our statute authorizing substituted rates for existing rates the statute

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than a constitutional issue, the state court was "constrained to act upon [its] own judgment." Accordingly, the order was held valid. A finding of unreasonableness was presumed and no express recital was required. See 119 Kans. at 48–49, 53.

[51] A number of the opinions on these points have explicitly distinguished *Wichita* on the ground that a different statute was involved and that the Kansas requirements were inapplicable. *Pacific States Co.* v. *White*, 296 U. S. 176, 186; Frankfurter, J., dissenting in *Yonkers* v. *United States*, 320 U. S. 685, 694; *Alabama Water Co.* v. *City of Attalla*, 211 Ala. 301, 305–06; *Southern Pac. Co.* v. *Railroad Commn.*, 13 Cal. 2d 89, 109–113; *Coleman* v. *Drake*, 183 Ga. 682, 687; *Valley & Siletz R. R. Co.* v. *Thomas*, 151 Ore. 80, 86.

> does not require any finding of facts, or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917. * * *

This Court's affirmance of *Midland*—particularly its explicit recognition that contract rates may, under appropriate statutory provisions, be changed by a filing and without a finding that existing rates are unreasonable (300 U. S. at 114; *supra*, pp. 65–66)—removes any possible doubt as to the inapplicability of *Wichita*.[52]

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[52] *Wichita* is cited in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 954 (C. A. 10), affirmed, 324 U. S. 581, referred to by the court below (R. 147–48). See *infra*, pp. 98–99. However, since it was with reference to a proceeding under Section 5 (a) of the Gas Act, in which a finding of unreasonableness of existing rates is a prerequisite to ordering new rates (see, *supra*, pp. 22–23), the citation is fully within the scope of *Wichita*.

In contrast, *Wichita* has been relied on in two other cases, arising in states which apparently have a filed rate procedure, as prohibiting any rate change proposed by the utility by a filing. *Attleboro Steam & Electric Co.* v. *Narragansett Electric Lighting Co.*, 295 Fed. 895 (D. R. I.); *Commonwealth of Virginia ex rel. Page Milling Co.* v. *Shenandoah Light & Power Corp.*, 135 Va. 47. Only in *Attleboro* did the court deal with the difference between the Kansas statute and the local law there involved and, in that case, the court followed *Wichita* by purporting to find a Rhode Island construction akin to that adopted in Kansas. To the extent that these cases assumed that their state law was the same as that in Kansas, the decisions represent the view of a limited minority and are clearly distinguishable. But to the extent that they applied *Wichita* to restrict the filed rate procedure, their reliance upon it was misplaced. It should be noted, however, that while on their facts these two cases involve contract

III

PERMITTING THE PROPOSED INCREASED RATE TO BE IMMEDIATELY EFFECTIVE, PENDING COMMISSION DETERMINATION OF ITS REASONABLENESS, RESULTS FROM CONGRESS' DELIBERATE ALLOCATION OF THE BURDENS RESULTING FROM UNAVOIDABLE ADMINISTRATIVE LAG.

Apparently underlying the ruling below is the court's feeling that application of the filed rate procedure in this case would be inequitable because Mobile would thereby be caught in a "squeeze" between the 14.5 cent per Mcf rate proposed by United for the gas sold to Mobile for the Ideal resale and the 12 cents per Mcf Mobile received under its contract with Ideal. See *supra* p. 4. The court apparently thought that the rate set in the United-Mobile contract could be increased pursuant to a Commission determination made after hearing, despite the resulting "squeeze" on Mobile. However, it seemed to feel that in view of Section 4 (e)'s express prohibition against suspension of rates for sales for industrial resale, it would be unfair to Mobile to permit the increase to be operative during the pendency of the Commission hearing, particularly if the Commission should ultimately determine that the proposed increase was unjustified.

A. The inequity may be more apparent than real. As far as we have been able to ascertain,

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rates, the thrust of the opinion in each case indicates clearly that the result would be the same for non-contract rates.

Mobile did not make any effort to eliminate, or even alleviate, the "squeeze" by seeking an increase in its rate to Ideal either before the state regulatory agency or otherwise. In this regard, it is noteworthy that Mobile may well have been able, under state law, to minimize the "squeeze"; Alabama, the state in which the resale is made and accordingly the state which has authority to regulate the resale rate, appears to have a typical filed rate procedure, as well as a complaint, hearing, and order procedure for changing rates (Ala. Code Tit. 48, Secs. 53, 54, 57, 64), and there is nothing to indicate that Mobile could not obtain relief from its contract rates with Ideal.[53] How-

[53] While there have been no Alabama decisions on the filed rate procedure, the courts of that state, as generally, have held that contracts by a utility cannot bind the state's regulatory power and rates fixed by the commission supersede contract rates. *Alabama Water Co.* v. *City of Attalla*, 211 Ala. 301, 307-08; *Alabama Water Co.* v. *Patterson*, 24 Ala. App. 558, 561.

In the court below, respondent's contention that Ideal's contract rates could not be changed rested on the approval of the Mobile-Ideal contract by the Alabama Public Service Commission and Ala. Code, Title 48, Sec. 325 (R. 41). This provides that "Rates * * * may be established by contract between a municipality and utility for a specific term, not exceeding thirty years, but only by and with the approval of the commission to be expressed by its order" and that "Utilities may contract with each other and with persons who are not utilities in respect of * * * the sale * * * of * * * gas * * * otherwise than pursuant to established rates * * * subject, however, in all such cases, to the approval of the commission * * *." Dictum in one case does suggest that under that statute a contract with a municipality could not

ever, even if no relief were available in Alabama, elimination of such a "squeeze" would be possible under the regulatory statute in the overwhelming majority of the states. See *supra*, pp. 56–68. If the "squeeze" is not avoidable in the instant case, that "defect" stems from an Alabama deviation from the procedure generally applied, a deviation which is adopted by a limited minority of states and which should play no part in the construction of the federal statute.

B. In any case, it is significant that since, even under the theory of the court below, the Commission has the authority to order United to charge rates higher than those set in the contract, the apparent inequity is limited to the time required by the Commission to have the hearing and to make its determination based thereon. While Mobile may suffer a loss on its Ideal resales during this period, that may be offset in substantial measure by the fact that United's proposed in-

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be changed except by consent of the parties. See *Birmingham Electric Co.* v. *Alabama Public Service Comm'n*, 233 Ala. 675. However, in that case the parties had agreed to a change in rates and the issue was as to the effective date to be fixed by the Commission for the change. *Alabama Water Co.* v. *City of Attalla*, *supra*, held explicitly that, despite the statute, a municipality's contract rates could be altered and *Attalla's* doctrine has been firmly reiterated in more recent cases. E. g., *Garrett* v. *Colbert County Board of Education*, 255 Ala. 86, 92; *Oppenheim* v. *City of Florence*, 229 Ala. 50, 57. Moreover, Ideal is not a municipality and the dictum of the *Birmingham Electric* case would not apply in any event.

creases on its other sales to Mobile were suspended by the Commission for the five months authorized by Section 4 (e), and consequently even should the Commission determine that the increases requested by United were justified in full, Mobile has been relieved from paying the increased rates in the other instances during the period of suspension. See *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C. A. 4).

It is such rough balancing that Congress apparently had in mind in prohibiting the suspension of sales for resale for industrial uses. When a gas company files proposed increased rates, the Commission makes a preliminary determination whether to permit the increases to be effective without hearing or to enter upon a hearing. Should it decide upon a hearing, the problem then arises as to what rates should prevail during the pendency of the hearings. Continuance of the old rates would be inequitable to the gas company if the Commission finally concluded that the proposed increases were justified. Permitting the new rates to be effective during the administrative hearing would, however, be unfair to the purchaser if the increases are rejected. Because of the time needed to pass upon new rates, such losses constitute a "necessary incident of rate regulation" (*Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 809 (C. A. 4)). But in order to establish some equitable allocation

of these possible losses between the gas company and its purchasers, Congress provided in Section 4 (e), on the one hand, that rates for sales for resale other than for industrial use may be suspended for five months and then be effective under bond subject to refund, and, on the other hand, that rates for industrial resales should not be subject to suspension at all. Indeed, as indicated *supra*, p. 44 fn. 28, Congressman Lea, who sponsored the prohibition against suspension of rates for industrial resale, advised the House, in effect, that in most instances the burden resulting from the non-suspendibility of these rates would be passed on to the industrial consumer—because of the generally short-term nature of contracts of sale for industrial use—so that very little, if any, would be borne by the immediate purchaser (the distributing company, *e. g.*, Mobile) from the gas company.

Hope Natural Gas Co. v. *Federal Power Commission, supra,* 196 F. 2d 803 (C. A. 9), presented the other side of the coin with respect to rate suspension. There, the gas company contended that it should be permitted to apply retroactively to the beginning of the period of suspension the higher rates fixed by the Commission after a hearing on the schedule proposed by the gas company. Holding that this was clearly precluded by the Act and was not required by the constitutional guarantee against confiscatory rates, the Fourth Circuit stated (196 F. 2d at 809):

> * * * Rate making is not an exact science and losses of one period must be counterbalanced against gains of another in any fair consideration of the reasonableness of the rate making procedure.
>
> It is true, of course, that a utility is entitled to rates that are just and reasonable; but this is not to say that rates must fluctuate automatically with every change in economic conditions or that a reasonable time may not be allowed for determining the reasonableness of a proposed increase in rates before it is allowed to go into effect. Any loss sustained by a maintenance of the status quo while such determination is being made is properly considered, not as a violation of constitutional right, but as a necessary incident of rate regulation so long as the period of suspension does not "overpass the bounds of reason." * * *

In the present case, the prohibition against suspension of rates for industrial resale operates to place on Mobile the burden of loss on the Ideal resale—pending the administrative determination. However, the holding in *Hope* is not a one-way street; and any loss sustained by Mobile, like the loss sustained by the utility there, is merely "a necessary incident of rate regulation."

C. Even if it be assumed that the delays inherent in processing the heavy volume of proposed rate increases have resulted in imposing an undue burden on purchasers of natural gas for industrial resale, the defect in the Act is one

which "must be cured, if at all, by the Legislature." *Public Service Commission* v. *Iroquois Natural Gas Co.*, 184 App. Div. 285, 287, affirmed by memorandum opinion, 226 N. Y. 580;[34] see also *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, 151; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82; *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 808 (C. A. 4). The Commission, for its part, has for at least the past several years urged Congress to delete the prohibition against suspen-

[34] In the *Iroquois Natural Gas case*, which involved precisely this problem, the New York court stated (184 App. Div. at 287):

"* * * under the statutes as they now stand it is the right of the gas company to increase its rates and make the increase effective 30 days after filing with the Commission its schedule of new rates. If complaint is filed with the Commission against the proposed increase, and if the Commission itself sees fit to act without complaint, then a proceeding may be started before the Public Service Commission which will result in an investigation of the propriety of the proposed increase; the Gas Company having notice and the right to be heard, and when a decision is reached, if the new rate is found excessive, it will be annulled or modified according to the decision of the Commission, but this decision may not take place until some time after the new rates have gone into effect. * * * This is the method, and the only method, provided by statute for protecting consumers and municipalities against increases in rates by gas companies. It may be that there is a defect in the statute, and that the Public Service Commission should have power to suspend or postpone the taking effect of proposed rate increases upon complaint made, or even upon its own motion, until a proper investigation can be had. If there is such a defect, it must be cured, if at all, by the Legislature. We must take the statutes as we find them."

—— F. 2d —— (C. A. D. C.), pending on writs of certiorari, Nos. 51, 53, this Term, there have been a number of cases in the federal courts presenting issues arising in the course of the Power Commission's processing of rate changes under the filed rate procedure. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (C. A. 5); *State Corp. Comm'n of Kansas* v. *Federal Power Commission*, 206 F. 2d 690 (C. A. 8), certiorari denied, 346 U. S. 922; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (C. A. 3), certiorari dismissed, 345 U. S. 988; *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (C. A. 4); *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C. A. 4); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C. A. 5), certiorari denied, 332 U. S. 770. While some of these cases do not discuss the propriety of applying the filed rate procedure when contract rates are being superseded, the reason is not that contract rates were not involved [37] but rather that the purchasing company accepted without question the propriety of the Commission's following of that procedure. In a few cases, however, the issue has been raised and in these the courts have recognized that the procedure followed by the

[37] The Commission's files show that contract rates were being superseded by the gas company's proposed changes in those cases.

Commission was that prescribed by the Act.[38] In contrast, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 954 (C. A. 10), affirmed, 324 U. S. 581, heavily relied on below (R. 147), has no bearing on the instant problem.

A. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (C. A. 5), *supra*, involved a suit by another customer of United whose rates had been fixed by contract and were proposed to

[38] While this Court has not previously passed directly on the issue, it has commented upon it. In *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, a case arising under the Federal Power Act, Penn Water complained that the Commission's order improperly required it to continue performance of a contract illegal under the antitrust laws. In answering this complaint, the Court, after holding that the Commission imposed no such requirement (343 U. S. at 421–423), went on to state (343 U. S. at 423–424):

"If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act, as the Commission pointed out, opens up a way provided Penn Water can prove that its wishes are consistent with the public interest. Shortly after Part II of the Power Act was passed in 1935, Penn Water, as required by § 205 (c), filed with the Commission the contract here attacked and then designated by the Commission as 'Penn Water's Federal Power Commission Rate Schedule No. 1.' Section 205 (d) provides that 'no change shall be made by any public utility in any such * * * service * * * or contract relating thereto, except after thirty days' notice to the Commission and to the public.' Here instead of following the procedure for changing existing services and practices—a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own—the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order."

be increased by the schedule filed on June 24, 1953. As in the instant case, the proposed increases were suspended for five months except for the rates for industrial resales, which went into effect on July 25, 1953. 217 F. 2d at 76, n. 3; R. 76. While Tyler accepted the propriety of permitting the latter rates to become effective, it sought to enjoin United from seeking to have the suspended increases put into effect at the end of the period of suspension on the ground that, since the rates had been fixed by contract, it was a breach of contract for United to attempt to change these rates, which, according to Tyler, could be changed only by order of the Commission made after hearing and a finding that they were unreasonable.

While the Fifth Circuit indicated that the holding of the court below in this case supported its affirmance of the denial of an injunction insofar as it required resort to the Commission, not the courts, for relief (217 F. 2d at 78), it also considered Tyler's contention that its contract rates could be superseded by filed rates only after a hearing and finding of unreasonableness. On this point, it stated that Tyler's position was "in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof * * *." 217 F. 2d at 77. With respect to Tyler's contention that United's "unilateral action" in seeking increased rates constituted a breach of contract which could be enjoined, the Fifth Circuit agreed with the district judge that this was

an incorrect characterization of United's filing, stating (217 F. 2d at 78):

> * * * the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme. So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should * * * restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4 (d) and (e) of the Act make plain, the court cannot do.

The district court was, if anything, more emphatic (R. 77–79):

> It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. * * *
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> * * * * *
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> So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable—and hence lawful—is for the determination of

the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates.

* * * United has followed the procedure prescribed by statute to secure this review, and if it files the motion which plaintiffs allege it contemplates, and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (Hope Nat. Gas Co. *v.* Fed. Power Comm., 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the Statute. Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service *shall* go into effect." [Emphasis added.] It is not for this Court to add another proviso, reading

"and where there is no private agreement or contract to the contrary."

Plainly, the reasoning in *Tyler* fully supports the Commission's position that the filed rate procedure applies to rate increases sought by a gas company even where the rate being superseded has been fixed by private contract.*

B. In *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (C. A. 3), *supra*, the gas company had filed under Section 4 (d) a schedule proposing rate increases. The Commission, without hearing, rejected the filing on the ground that part of the proposed increase was predicated on an anticipated increase in the cost of gas which had not materialized as yet. In an opinion by Judge Hastie, who dissented in the

*The court below sought to distinguish the District Court's opinion in *Tyler* principally on the ground that the proposed increase involved in *Tyler* was for domestic resale, and was therefore suspendible and suspended by the Commission under Section 4 (e) of the Act, whereas the increase here was not suspendible (R. 141, fn. 3). But the question of suspendibility *vel non* has nothing to do with the question of the applicability of the filed rate procedure. Suspendibility of certain types of proposed increases follows as a matter of course once it is determined that the filed rate procedure is applicable.

The further distinction formulated by the court below, *i.e.*, that *Tyler* did not raise "the all important question before us of whether there should be a hearing on the reasonableness of an existent unchanged approved contract prior to acceptance for consideration of the new rate and prior to the determination of the reasonableness of that new rate" (R. 141, fn. 3), is based on a misreading of the excerpt quoted by the court.

instant case, the Third Circuit, after noting that the schedule complied with all of the Commission's formal requirements, held that the Commission had erred when it "refused to recognize as properly before it or retain for action as prescribed by statute a filing which meets all formal requirements" (202 F. 2d at 902). As we have already pointed out (*supra*, p. 35) the court continued (*id.*):

> * * * On the face of Section 4 of the Natural Gas Act * * * it is clear that, Mississippi's proposed tariff changes having been duly filed, the Commission had only two alternatives. By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. It purported to follow a third course, rejection without hearing—a course for which it cannot show even color of statutory authority.

The observation in the opinion below that "the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rate" (R. 155) cannot be reconciled with the holding in the *Mississippi* case that that procedure was one "for which it [the Commission] cannot show even color of statutory authority." The Commission cannot simultaneously accept a

new rate filing pending a hearing as to reasonableness (as it was held required to do in *Mississippi*), and reject the filing because no hearing has as yet been had (as the ruling below requires it to do).[40] See, also, *supra*, pp. 33–35, on the Commission's lack of power to reject a filing on other than formal grounds.

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[40] The court below purported to distinguish the *Mississippi* case by relying on a Commission regulation (18 C. F. R. 154.85) which requires that "agreements intended to effect a change or amendment in [an existing] contract may be made only by the execution of a form of service agreement contained in the tariff" (R. 153). According to the Court of Appeals, Mississippi's filing complied with the regulations and could not have been rejected since "there was apparently no existing filed contract" (R. 154) and, on the other hand, United's filing had not complied with the above regulation for changing contracts and hence must be rejected. But this distinction is based on an erroneous assumption of fact and an erroneous reading of the regulation.

First, the court assumed that the existing rates in the *Mississippi* case were not contract rates. However, its own records in that case show that Mississippi's rates had originally been fixed by contract and that Mississippi proposed to change them by filing a schedule without the purchaser's assent. See *Mississippi River Fuel Corp.* v. *Federal Power Commission*, *supra*, C. A. 3, No. 10868, Jt. App. 4a, 7a.

Second, the above-quoted regulation plainly prescribes only the form of *agreed-upon* changes in contract rates and does not limit the effectiveness of changes filed by the natural gas company alone. As already noted, *supra*, pp. 37–38, rates are on file in tariff form and the company's executed contracts, filed separately, must correspond with forms of service agreements filed with the tariff. 18 C. F. R. 154.40–.41. It is to maintain this conformity that the regulations require that *agreements* which change an existing contract must be in the form of a newly executed service agreement and shall

C. In contrast, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943 (C. A. 10), affirmed, 324 U. S. 581, relied on by the Court of Appeals below, is irrelevant. The court rested upon an excerpt from that decision to the effect that "[t]he passage of the Act did not automatically overthrow the contracts into which these companies had previously entered * * *. Such rates and charges could be modified only after an express finding of unreasonableness * * *. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand" (R. 147–48).

However, when read in context, the quoted excerpt has no bearing on the instant problem. In making that statement, the Tenth Circuit did not have before it a case in which the gas company had sought a rate change under the filed rate procedure. On the contrary, in that case the Commission had ordered the contract rates reduced after a hearing held under Section 5 (a) and entered upon by the Commission on its own motion and on complaints of interested states and

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not contain any supplements. 18 C. F. R. 154.63 (b) (5); 18 C. F. R. 154.85. United's filing on June 24, 1953, was not an *agreement* and hence did not have to comply with those provisions, but rather with the formal requirements for filing of *schedules*. 18 C. F. R. 154.63 (R. 3). The regulations clearly recognize that such a schedule may supersede contract rates, *supra*, pp. 38, 39.

state commissions. And the quoted excerpt was made with reference to the necessity of substantial evidence being developed at the hearing to support the Commission's order. Consequently, while the Tenth Circuit properly stated the substantial evidence rule and the necessity of findings, it did not purport to be passing, or expressing an opinion, on the applicability or scope of the filed rate procedure provided in Sections 4 (d) and 4 (e) of the Act.[81] As to these, there was no issue before the Tenth Circuit.[82]

[81] This Court's opinion in *Colorado Interstate* did refer to Section 4 (e) but only to reject the contention that rates for sales for industrial resales are not subject to Commission jurisdiction. 324 U. S. 581, at 596.

[82] *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, cited in *Colorado Interstate* and heavily relied upon by the court below, is discussed in detail *supra*, pp. 72–80.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1955.

APPENDIX

1. The Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et seq.*, provides in pertinent part:

SECTION 4. * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect [June 21, 1938]) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without

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requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall

go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same

by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

2. The Federal Power Act, 49 Stat. 838, 847, 16 U. S. C. 824, *et seq.*, provides in pertinent part:

SEC. 205. * * *

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new

schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(c) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in

case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. * * *

3. Sections 6, 13 and 15 of the Interstate Commerce Act, 49 U. S. C. 6, 13, 15, provide in pertinent part:

SEC. 6 (1) *Schedule of rates, fares and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which

in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *

(3) *Change in rates, fares, etc.; notice required; simplification of schedules.* No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed

if, in its judgment, not inconsistent with the public interest.

SEC. 13. (1). *Complaint to commission of violation of law by carrier; reparation; investigation.* Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

13 (2) *Complaints by State commission; inquiry on commission's own motion; expenses of State commissions.* Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad com-

missioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. * * *

* * * * *

SEC. 15 (1) *Commission empowered to determine and prescribe rates, classifications, etc.* Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded,

charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(7) *Commission to determine lawfulness of new rates; suspension; refunds.* Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any

new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule, and defer the use of such rate, fare, charge, classification, regulation, or practice but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such

amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

4. The Kansas statute, Kans. Sess. Laws 1911, c. 238, involved in *Wichita R. R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, provided in pertinent part:[1]

> SEC. 11. Every public utility and every common carrier doing business in Kansas, over which the Public Utilities Commission have control, shall publish and file with the Public Utilities Commission copies of all schedules of rates, joint rates, tolls, fares, charges, classifications and divisions of rates affecting Kansas traffic, either state or interstate, and shall furnish said commission with copies of all rules, regulations

[1] These provisions are at present codified in Kans. Gen. Stat. Ann. Secs. 66-108, 66-110, 66-111, 66-113, 66-117 (1949 ed.). The Kansas regulatory body is designated therein as the "state corporation commission," pursuant to Kans. Sess. Laws 1933, c. 275, sec. 3; Kans. Gen. Stat. Ann. Sec. 74-602.

and contracts between common carriers or public utilities pertaining to any and all services to be rendered by such public utility or common carrier. The Public Utilities Commission shall have power to prescribe reasonable rules and regulations regarding the printing and filing of all schedules, tariffs, and classifications of all rates, joint rates, tolls, fares, charges and all rules and regulations of such public utilities and common carriers.

* * * * * *

SEC. 13. It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the commission shall find that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the orders of this commission, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the

commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and reasonable. Whenever, in the judgment of the Public Utilities Commission, public necessity and convenience require, the commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions.

SEC. 14. Upon a complaint in writing made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization, or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or that any service performed or to be performed by such public utility or common carrier for

the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary. The commissioners may, upon their own motion, and without any complaint being made, proceed to make such investigation, but no order affecting such rates, joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the commission without a formal public hearing, of which due notice shall be given by the commission to such public utility or common carrier or to such complainant or complainants, if any. * * *

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SEC. 16. If upon such hearing and investigation the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the state of Kansas, the Public Utilities Commission shall have the power to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discrimi-

natory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of any of the laws of the state of Kansas, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary. * * *

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SEC. 20. Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules, and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

U. S. GOVERNMENT PRINTING OFFICE 1936